IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL., Plaintiffs, vs. AMERICAN BRANDS, INC., ET AL., Defendants.	)	Judge David D. Dowd, Jr. Akron, Ohio Civil Action Number 5:94CV1302

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY

ON THURSDAY, SEPTEMBER 27, 2001.

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VOLUME 4

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

THE COURT: Please be seated.
We are still a few jurors short.
MR. McLAUGHLIN: Okay. Good morning, Your Honor.
THE COURT: Well, I don't know.
(Laughter).
MR. McLAUGHLIN: It is. It is.
Can we see you before we get started?
THE COURT: Sure.
(Side-bar conference had off the record).
(Jury in).
THE COURT: Good morning. Please be seated.
Members of the jury, the normal routine, of course, is that the plaintiff presents its entire case before the defendants have the opportunity to go forward or the responsibility to go forward.
However, today the next witness will be Professor Joan Hoff, H-O-F-F. Professor Hoff is being called by the defendants. Ordinarily Dr. Hoff would testify during defendants' case. However, because of some scheduling difficulties beyond her control, and with the plaintiff's permission, I am permitting her to testify during plaintiff's case in chief.
So view this as defense testimony. The plaintiff will have the opportunity to cross-examine this

witness, just as the defendants have had the opportunity to cross-examine the plaintiff's witness.
So when she testifies, assume and understand that this is part of the defendants' case. I appreciate the plaintiff agreeing to permitting the defendant to call Dr. Hoff out of order.
You may now proceed, please.
MR. COFER: Thank you, Your Honor.
Mr. Smith, thank you very much for that courtesy. Members of the jury, good morning. Your Honor, good morning.
The defense calls Professor Joan Hoff.

JOAN HOFF

of lawful age, a witness called by the Defendants, being first duly sworn, was examined

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and testified as follows:

DIRECT EXAMINATION OF JOAN HOFF

BY MR. COFER:

Q. Good morning, Dr. Hoff.

A. Good morning.

Q. Would you please tell the jury what you do for a living?

A. I'm a professor of history at Ohio University in Athens.

Q. Could you briefly describe your educational

background since high school?

A. I was born and raised in Montana, so I went to the University of Montana for my undergraduate degree. I majored in European history and journalism.

Then I went on to Cornell University, majored in Slavic history. And then to the University of California at Berkeley where I majored in U.S. history.

Q. And so it's clear for the jury, if I address you as Dr. Hoff, you have a Ph.D.; you are not a medical doctor, correct?

A. That's correct.

Q. Would you tell the jury what does an historian do?

A. Well, what we do very generally speaking is study change over time. And that time period can be a decade, it can be several centuries or more, or it can be a one or two year period.

So what we look at is a specific time period and try to see if we can detect changes, either events which change the course of history, or people who may have changed the course of history, or movements which may have changed the course of history in any given time period.

We look for change, and basically we are trying to determine whether there was more change at a given time period or more continuity in a given time period.

Q. Professor Hoff, where have you taught history?

A. Well, I started as a graduate student, Ph.D. graduate student teaching at the University of California in Berkeley. But then I went on to Sacramento State. I've taught in Arizona Southern, the University of Arizona.

I spent most of my time, over 15 years, at the Indiana University in Bloomington. And then I went on to Ohio University. And last year I had a fellowship at the College of William and Mary.

Q. Have you published any books or articles in the field of history?

A. I've published 13 books on a variety of topics because I specialize in a number of different fields, and around 80 articles.

Q. How many of those articles have been published in the peer review literature?

A. Most of the articles were reviewed by journals which have other scholars look at them before they are published. And all of the books are subject to peer review.

Q. Professor Hoff, have you ever been asked to appear on television to comment on historical issues?

A. Well, because of one of my specialties, which is the modern presidency -- I've written on Herbert Hoover, Richard Nixon -- I've appeared quite often in the past, oh,

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five or eight years, on programs where they need

presidential scholars.

So I have been on the PBS News Hour with Lehrer when the first one was McNeil and Lehrer, and now the Lehrer program, and on CNN and on the Fox channel.

Q. Have you served as an editor of any professional journals?

A. I founded and edited for eight years a -- the Journal of Women's History which is a social and cultural journal devoted to the study of women.

But I also edited Presidential Studies Quarterly in a position I had when I headed the center for the study of the presidency in New York City.

Q. Professor Hoff, have you received any honors for your work in the field of history?

A. Well, like most scholars, we depend on grants and fellowships to finance our research, and probably the most prestigious fellowship you can receive, not only in history but in other disciplines, which is the Guggenheim which I was awarded, but primarily my research and some of my teaching in foreign countries has been sponsored by the Fulbright program.

So I have taught and done research in Ireland, Poland, a little bit in Germany, all under the auspices of the Fulbright program.

Q. I have in my notes you also served on the Pulitzer

Prize for historical works and also addressed the Nobel Institute, is that correct?

A. That's correct.

Q. Specifically would you tell the jury what type of an historian are you?

A. Because I've specialized in a number of fields, I started out as a -- what I call and which most historians now call -- as a traditional historian.

I study politics, I study foreign policy, and that meant in essence that I studied prominent individuals and major events in history.

But after I became a full professor and looked at other areas, I became interested in women's history. And in order to study women's history, I had to think about a newly developing field, a subfield really of history which was called the social and cultural history.

So in essence, what I've done in the last 25 or 30 years is to continue this traditional research, but also pick up with the new social and cultural history because of my interest in the history of women.

Q. And tell the jury, if you would, what is social and cultural history?

A. Well, unlike -- I think the easiest way to explain it is that unlike traditional history, which studies important people and important events, what social and cultural

history does is to look at how ordinary people live. That is, we try to find out what they wore, sometimes what attitudes they held, what professions or jobs they may have held or engaged in.

And so what we are trying to do is understand, as we sometimes say, history from the bottom

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up; what communities or groups of people did in any time period.

We are looking at the lives then of ordinary people collectively rather than looking at the life of a single individual, which traditional historians tend to do.

Q. Professor Hoff, what have you been asked to do in this case?

A. In this case I had a very specific task which was to look at a particular time period, the period or the years from 1950 to 1964, '65, and to try to determine commonly held attitudes or common knowledge or common information available to the average person about the link between lung cancer and cigarette smoking.

Q. Is this a task that is particularly suited for an historian to do?

A. For a social and cultural historian, it's a perfect task to take up.

Q. Why is that?

A. Because again as I said, you are trying to determine

popular or common attitudes, general awareness about a specific subject; in this case, linkage between lung cancer and cigarette smoking.

Q. Professor Hoff, when conducting historical research, do you use the historical method?

A. Yes, I do, as all professional historians do.

Q. And did you use the historical method for the opinions that you have reached and you are going to express in this case today?

A. Yes, I did.

Q. Do you have a demonstrative that would assist the jury in understanding what the historical method is?

A. Yes.

MR. COFER: Your Honor, I'm going to use a number of demonstratives with the Court's permission.

Would you mind if I asked Mr. Proctor to stand there and put them up for me?

THE COURT: You may proceed.

MR. COFER: Thank you very much. If you would put the first one up, please, Mr. Proctor.

BY MR. COFER:

Q. I want to make sure you can see and they can see it.

A. I can see it.

THE COURT: Don't worry about me. Make sure the witness can see it.

MR. COFER: Can everyone see this?

THE COURT: I can see it. I can see it.

BY MR. COFER:

Q. All right. An historical method.

What is the first thing a historian does when using the historical method?

A. Well, it's obvious to us, but it may not be obvious to a general audience, that the very first thing you have to do is make sure you are asking an important major question about the subject you've chosen to study.

If you ask trivial or questions which are sort of off the mark, you can waste a lot of time in terms of your research, and you may come up with evidence that doesn't really apply to the subject matter in any significant or original way.

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So you've got to frame these questions, and we teach our graduate students to make sure they are asking the major questions. Sometimes we say it's more important to ask the question than to actually find an answer to it, because it keeps you focused on the subject.

Q. And again for this case, what was the specific question that you framed?

A. For this time period, from 1950 to '64, it was whether or not there was information in -- available to the average person about the linkage between smoking and lung

cancer.

Q. And by this time period, do you mean 1950 to 1964 or '5?

A. Yes.

Q. And when you say "available to the average person," do you mean the ordinary person in Ohio?

A. I do.

Q. As a social and cultural historian, are you familiar with the concept of common knowledge?

A. I'm familiar with the term because it's one that we use in that subfield of social and cultural history.

Sometimes you'll hear the term "Conventional wisdom" used instead of common knowledge. Sometimes you even hear the term "common sense" used.

But by and large, historians have decided that we will use this term "common knowledge."

Q. And as a social and cultural historian, what does common knowledge mean?

A. Well, the thing to keep in mind about common knowledge is the word "Common," because what it really means is that this is the lowest common denominator of information that a society or a culture conveys to its people.

It's the kind of general awareness on a variety of topics that the society puts out there, either

in the form of newspaper articles or other media, or through popular songs or through movies or through a variety of other ways.

Every society prepares its people to think in a certain way about a variety of topics.

And we begin to acquire common knowledge as children. Usually we do this, we acquire this kind of knowledge from our parents who are concerned about preventing us from harming ourselves as we grow up. So they give us advice about dos and don'ts of things to avoid like playing with matches.

And our parents also instill in us certain values, sometimes religious values or political values, but it's this very, very low level general awareness that constitutes the common knowledge or the commonality of knowledge.

Q. Professor Hoff, does common knowledge mean the same thing as belief?

A. In my opinion it does not, because a belief -- common knowledge is a passive kind of knowledge that comes to you whether you know it or whether you even want to become aware of it. It's something that simply is passed on from generation, and -- as I say, passed on from generation to generation and usually begins to come to us from our

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parents.

A belief, in my opinion, is something that you hold or come to believe about a subject because you go actively out to seek knowledge on a particular topic. And then you come to hold a belief that you have actively pursued or actively attempted to inform yourself about.

And on basis of that belief, very often you might either take action or simply come to hold this belief very strongly.

Whereas, it's not a passive type of activity at all in terms of your acquirement of the information.

Q. Professor Hoff, is common knowledge necessarily based on scientific fact?

A. No, it is not, because as I say, as it's passed on over time, it's accumulative; it goes from generation to generation.

Sometimes it's ahead of scientific knowledge, not -- this isn't common, but sometimes it is, and very often it's not based on scientific information at all.

Q. Can you think of a couple examples of when common knowledge actually came before or got ahead of scientific fact?

A. Well, one of the reasons that tobacco usage in general is of interest to social historians is that it is -- tobacco usage and just tobacco products in general have had a very negative image over time from the beginning

of the, say, the 17th century when it was really first introduced and used in Europe in a widespread way.

And so what's interesting about this is that the image of tobacco, the general awareness about tobacco usage was largely negative; that is, the idea was conveyed almost from the beginning that there was something harmful, there were ill health effects associated with tobacco usage.

And in this case, it took several centuries before scientific evidence caught up with that kind of common knowledge.

Q. But --

A. To think about maybe a better example, a more mundane one, is simply the idea we've all held for some time in this country, at least, that chicken soup was good for you if you had a cold and you were sick.

Recently scientists have proven, indeed, there is some medicinal benefit from eating chicken soup if you have a cold or the flu.

Q. Do people always act on their common knowledge?

A. No, that's another interesting thing about the concept. Because this is about general awareness, you may know something that your parents have told you to do or not to do or that you've picked up in school or from other institutions in the society, but because we are human, we

don't always act on the basis of common sense or reason, and we are risk takers.

So the answer is no.

Q. Is AIDS an example of not acting on common knowledge?

A. Well, sadly it's probably one of the best examples now because just last month the "New York Times" carried a

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series of articles on the gay community in San Francisco.
If there's any community that has a general awareness and very specific awareness, in most instances, of the seriousness of having unprotected sex and of the deadly nature of AIDS, it is the gay community. And there is an increase right now in unprotected sex as practiced by gay men in San Francisco.
So common knowledge doesn't mean you are going to always act in your best interest.
Q. Professor Hoff, the second thing you have on the board in front of the jury, it says "Identify sources and collect information."
Could you tell the jury about that, please?
A. Again, this is -- it looks simple, but it's a little more complicated than it sounds or looks on the board.
There are two types of sources that professional historians use. One type we call primary sources. These are documents that are actually produced in the time period you are studying. So you would go back to

newspapers, say for the 1950s, or if you were studying the 19th century, you would look at newspapers and magazines there.
When you are looking for documents, these primary documents are produced by people who lived in the period, or by newspapers and magazines, or there could be memoirs or diaries or letters. They are produced in the time period. So they are called primary because of that.
We also look at what we call secondary sources. And we usually start with these. These are articles or books written about the time period or the person you want to study or the subject you are studying.
So what we teach our graduate students is to first look at the secondary sources to see what's been written. Then to go to these primary sources, one, to see if the secondary sources are true, if -- and the other thing is to come up with maybe an original interpretation or sources that haven't been used before.
Q. Professor Hoff, after you frame the question, you've identified the sources, you've looked at the primary and secondary and collected the information, what's the next step in the historical method?
A. We gather what we call aggregate data from these two kinds of sources which really just means we gather a lot of facts and just lump them together.

And the important thing that we have to teach our students is then to look at this body of information and to analyze it in such a way as to obtain or to get from that body of information certain patterns, to perceive certain patterns or generalizations so that we can then begin to come to some conclusions about the material.
So the analytical process involves not so much the gathering of the material, but the looking at that material and coming to some conclusions or generalizations from it.
Q. Professor Hoff, I think you may have mentioned this earlier, but in the course of your teaching career, do you teach graduate students in history how to use the historical method?
A. Well, at Ohio University, I teach exclusively

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graduate students. But I've taught this for a good 25 years.
Q. Professor Hoff, what is bias and hindsight?
A. Well, one of the things that's part of this analytical portion of the historical method is that you have to talk to your students about their own biases and prejudices because we all bring a lot of baggage with us to any, any subject that we are addressing.
And so we -- we make an effort to indicate to the students that they should recognize their own biases

and prejudices and not be -- let their analysis be influenced by those things.
We also very strongly stress that you shouldn't use contemporary values or contemporary opinions in your analysis of the past because that simply means you are imposing a value, let's say from the 1990s or from the 21st century, on the 19th or on the 20th century.
So what we teach them is not to use hindsight, or to use it as little as possible, in their analysis, because you are prejudicing the evidence if you apply contemporary values to a time period of the past.
We are trying always to tell them to put the evidence in the historical context of the period.
Q. Professor Hoff, is this the first time that you have been asked to testify about the public's common knowledge of the hazards of cigarette smoking?
A. No, it is not.
Q. How many times and what did you do?
A. I've testified three times before in cases involving three different states.
Q. Were you asked to do the same thing in each case?
A. Well, in one sense I was, because when I first began this type of research back in, I think it was 1994, I did a very general survey of attitudes toward tobacco usage from, say, the 1600s forward.

And that informs my opinion in this case and informed my opinion in those other cases.
But the uniqueness of each case is that I always -- and any social historian would do this -- I always feel that I have to look at the individual state from which the plaintiff came to see what types of information, either from the popular media or from the educational system, that person might have been subjected to in terms of forming some general awareness about, in this case, the linkage between cigarettes and lung cancer.
Q. Professor Hoff, you told the jury a few moments ago about the process of reviewing secondary sources and primary sources.
Approximately how many articles have you read and reviewed for your opinions in this case?
A. Again remember the articles are secondary sources, can be secondary sources, but largely they were newspaper sources which would make them primary.
And I've reviewed probably a couple hundred articles over all, just for this case alone that are case specific here.
Q. Okay. Let's discuss, then, the particular sources you reviewed to arrive at your opinions in this case.
Do you have a demonstrative that would assist

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the jury in understanding the sources that you considered

in giving them opinions that you are going to give them this morning?

A. Yes.

MR. COFER: Your Honor, do I have permission to display that?

THE COURT: Yes.

MR. COFER: Thank you.

Q. Tell the jury, just, first, a general overview of the sources of information you considered for your opinions in this lawsuit, please.

A. Well, as you can see there, I looked at a number of national news magazines, I think you can define them as.

Then I looked specifically at Ohio sources.

And then I looked at general popular media presentations other than newspapers or national magazines.

Q. Professor Hoff, why did you review "Reader's Digest"?

A. Well, we tend to forget that "Reader's Digest" was this incredibly popular, widely distributed national magazine back in the 1950s. It had a subscription rate that exceeded by twice or three times any other national magazine, and it condensed articles so that people could understand topics or come to an, at least, a partial understanding of them and very quickly in a couple of pages.

Q. And why did you review "Life" magazine?

A. Well, "Life" again had its own unique characteristics, but they were different from "Reader's Digest" which condensed these articles.

"Life" was the first pictorial national magazine. It became famous during the second world war because of the pictures of battles that it published for its readers.

So what "Life" does, and today it does it as it did back then, but it was -- it was popular in the fifties because it conveyed information to people without having to require them to read very much.

They could look at the picture, read the caption, and get the gist of the information. And the plaintiff in this case said that he enjoyed looking at the pictures in "Life" magazine.

Q. Why did you review "Time," "Newsweek" and "U.S. News"?

A. For similar reasons of the other two, they were, again for the fifties, the -- not as widely distributed or as read, but they were the three major national news magazines which would have been easily available to people across the country and in the State of Ohio.

Q. With respect to the Ohio sources, why did you read -- actually two questions.

Why did you review Ohio newspapers and which

ones did you review?

A. Again, because I think it's important if you are going to determine the general awareness or common knowledge of a particular individual, you'd have to look at the sources available for that individual.

So I looked at the "Cincinnati Enquirer," I

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looked at the "Cleveland Plain Dealer," and of course I looked very carefully at the "Akron Beacon Journal" where the plaintiff lived.
Q. And how did --
THE COURT: May I see counsel at the bench for a moment, please?
(Proceedings at side-bar:)
THE COURT: Well, I want to express a concern about the direction that I think this testimony is going.
And it appears to me that it is the focus on this particular decedent and his knowledge as opposed to common knowledge of the ordinary person.
MR. COFER: It is not.
THE COURT: Well, she is going that direction. She is talking about where the plaintiff lived and the fact he read the "Akron Beacon Journal," he looked at "Life" magazine.
She is personalizing this opinion on the plaintiff.

MR. COFER: What I will do --
THE COURT: I'm going to have to stop you if it goes on.
MR. COFER: Okay. What I will do then is I will advise Professor Hoff that what we are interested in is the common knowledge of the ordinary person.
THE COURT: We will take a brief recess and you can talk to her.
MR. COFER: I can do it in front of the jury.
THE COURT: I would rather take a brief recess, you talk to her, because I don't want to shut you down.
MR. COFER: We weren't going that way.
THE COURT: That's where she is going.
MR. COFER: We were establishing here is common knowledge in the United States, here it is in Ohio.
THE COURT: Let me make my point clear: If the decedent had been a Rhodes scholar and was a doctor, you still would have to prove common knowledge of the ordinary person.
By the same token, if the decedent had been a dunce, somebody who is mentally defective, it would still be the same test; it would not be personalized on the particular decedent. And I feel very strongly about that.
So I want to be sure we don't get off on the

wrong track, and I will take a little recess and you can talk to her.
MR. COFER: Okay. That's fine.
(End of bench conference).
THE COURT: We will take a short recess. You may file out. I'll call for you when we are ready.
It will only be about five minutes.
(Recess taken).
(Jury in).
THE COURT: Please be seated.
You may continue.
MR. COFER: Thank you, Your Honor.
BY MR. COFER:
Q. Professor Hoff, where I think we were when we took the break is you just talked about you reviewed the "Akron

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Beacon Journal," the "Cleveland Plain Dealer" and the "Cincinnati Enquirer."

Tell the jury why you reviewed laws and school text and curriculum, please.

A. Again because I wanted to see what was going on in the State of Ohio with respect to legislation about what should be taught in health classes.

And the State of Ohio has a fairly long history of mandating certification for teachers in these health classes to initially teach about what they call

alcohol and narcotics, and they include tobacco in that narcotic category.

So going all the way back to the 1880s, you find the State of Ohio legislature indicating it wanted its teachers certified in these subjects, capable of teaching them, and it had also began to mandate curriculum and textbooks in the field of health.

And I wanted to see what that legislation was like because it varies from state to state. And Ohio ended up with a fairly precise and mandated educational system with respect to what was taught in health classes.

Q. And, Professor, the last question on this board: What relevance does popular culture have to your opinions in this case?

A. Well, as I say, if -- because every, every society conveys this general information, you have to look at, say, popular songs or movies, or in our day and age television, to see what is being conveyed.

And we couldn't, for example, laugh at jokes or understand cartoons and laugh at them unless we had this broad general awareness on certain topics.

Q. Professor Hoff, what we are interested in here is whether there was common knowledge of the link between cigarette smoking and lung cancer in Ohio between 1950 and 1965, correct?

A. That's correct.

Q. In order to put the 1950s into context, is it important to have a general sense of how the public viewed cigarette smoking before that?

A. Yes, it is.

Q. What are some of the earliest references you found to health hazards or hazards to the lung caused by tobacco?

A. Well, as -- I did a study really of 3 or 400 years of tobacco usage, and probably the earliest ones that are relevant today are those that came in the early 1600s, in the 17th century.

One of the most famous quotes that is cited over and over again came from James, I, of England in 1604. And James, I, was an interesting kind of ruler because he had a special conscience. He's the one, for example, that decided there should be a better translation of the Bible, so we have the King James version of the Bible.

And in this case he was concerned about his citizens in a health sense. He wanted them to be healthy, and he went to the time and trouble of writing a pamphlet on tobacco use.

MR. SMITH: I would move to strike, Your Honor.

THE COURT: Overruled.

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Q. And specifically, what did King James say of interest with respect to your opinions in this case in the "Counterblaste"?

A. Well, this is the famous quote that you can read in practically every secondary source on the subject, and you can see it there.

He went out of his way to say in one page of this that "Tobacco usage was a custom," in England, he's talking about, "loathesome to the eye, hateful to the nose, harmful to the brain and dangerous to the lungs."

Q. Thank you, Professor.

Over the last 200 years, have there been groups in the United States that have been opposed to tobacco?

A. From the founding of the nation, particularly among colonial ministers in New England, they constantly preached from the pulpit against tobacco use.

They referred to these -- tobacco as a poison in most of these lectures, and from that point forward secular leaders picked up the idea and certain reform groups did.

Q. Were there slang terms used to describe tobacco?

A. Again part of the common culture or common knowledge on any topic, an indication of that common knowledge is when slang terms come into vogue.

And with respect to cigarette smoking, the

first primary source I found on it or found about the use of the slang terms was in the late 1880s where the terms cancer stick and coffin nails began to be used in newspapers to refer to cigarettes.

The "New York Times," by the 1990 -- 1890s, I should say, was commonly using these slang phrases, and the average person wouldn't understand these phrases unless they have become a part of common knowledge.

Q. Let's go to the third item on the board, Professor.

Were there early smoking restrictions or employers that had restrictions in the workplace?

A. Yes. A number of the major manufacturers in the country around 1900 began to insist that their employees not smoke.

Henry Ford and Thomas Edison are the better known ones or the best known ones, but Marshall Field's did this, Cadillac did this, a railroad -- railroad companies also insisted that their employees not smoke around the turn of the century.

Q. Thank you, Professor Hoff. And in the early 1900s, did any states ban the sale of cigarettes?

A. Yes. Some of the secondary sources I read differed on this matter so I had to look it up specifically, but I determined that 16 states actually banned the sale of cigarettes from about, say, 1890 to the beginning of the

first world war, 1914, 1917.

And two states actually banned cigarettes, period.

Ohio tried both, but failed. They tried three times between 1900 and 1911 to do this.

Q. And generally speaking, who initiated these efforts

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to ban the sale of cigarettes, restrict tobacco use?
A. They came from a variety of sources.
Certain religious groups were against smoking in the State of Ohio. But you had suffragists, women who wanted equal -- the right for women to vote often took up both the temperance movement against alcohol and also joined movements against smoking.
And keep in mind that beginning of the twentieth century, there was a very broad reform movement going on in the country known as the progressive movement, and many of those reformers agitated for these kinds of bans or restrictions on cigarette use.
Q. And how are these local grass root efforts important to your opinions in this case?
A. Well, I think that most legislation, whether the bills pass in the State legislature or don't pass, the fact that they are presented usually reflects some kind of common knowledge about the subject and agitation at the grass roots level on that subject matter.

And so that's why these pieces of legislation are important. They are a reflection of common concern, common knowledge on an individual topic like, in this case, cigarette smoking.
Q. Professor Hoff, I don't want to discuss in detail.
You mentioned earlier, though, that you looked at Ohio textbooks and curricula. Could you just tell the jury generally what you found?
A. As I said from the late 1880s forward, the State of Ohio mandated that its teachers be certified and capable of teaching on alcohol and tobacco usage.
And by the 1930s, the State actually had standardized tests which it issued to its students and had them take on a periodic basis. And it also had a list of recommended textbooks for these health courses.
MR. COFER: Your Honor, may I approach the witness?
THE COURT: Yes.
BY MR. COFER:
Q. Professor Hoff, let me hand you what has been marked as Exhibit PT 998.
Would you identify this for the record, please?
A. Yes. This is called the Every Pupil Test which was one of these standardized tests. This one happened to be

dated December, 1957.
Q. And let me ask you this: Did you review this test and do you rely on it for the opinions you are expressing in this case?
A. Yes, I did.
Q. Do you have a demonstrative that would illustrate to the jury why this test is significant to your opinions?
A. Yes.
MR. COFER: Permission to display, Your Honor?
THE COURT: You may.
MR. COFER: Please.
Q. Would you please tell the jury, Professor Hoff, what the Ohio or the Every Pupil Test is and how that is significant to your opinions in this case?

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A. It was one of these uniform tests that the school system used because it was legislated to do so.

And you can see this is a fill-in-the-blank statement that the students are being queried about, and it reads "Several scientists tell us that excessive blank may cause lung cancer." Now, obviously the answer is smoking.

And what's interesting about these standardized tests was not only was Ohio one of the states -- not all states did this -- to have them, but I for a number of years worked on the standardized aptitude

tests that students are given to get into college that Princeton University puts together, and everytime we had a statement like this, we realized that the teachers would teach to that kind of question or statement, whether it be fill-in-the-blank or multiple choice.

But we also knew that if we were considering putting a question like that in, they were already teaching about it because we had feedback from these school systems.

So these standardized tests reflect then what's generally being taught out there, and they are an important indicator of what common knowledge might be on certain subjects.

Q. Thank you, Professor Hoff.

You've told the jury thus far about early information and references to tobacco.

Let's move specifically to the 1950s. Okay?

How did common knowledge about the hazards of cigarette smoking change in the 1950s?

And also, we have a summary chart that would assist the jury in understanding the studies that were published and how they were reported, is that correct?

A. That's right.

MR. COFER: Can everybody see this?

Q. Okay. First, would you just tell the jury generally how the science changed or how common knowledge changed in

the beginning of 1950?

A. Well, keep in mind what I have been saying is that up to 1950, there was this general awareness of the negative image of tobacco usage and cigarette smoking with respect to the health hazards associated with smoking and tobacco use.

But what happened in the fifties is really quite interesting. You begin to see in the national press and in the State press and media, the -- an emphasis and a publicizing of relatively complicated scientific studies. And they begin to be publicized widely, nationally, in 1950 with the first study that you see there.

Q. The Wynder and Graham epidemiological study has been discussed in this case already.

That was a major retrospective epidemiological study published in 1950, is that right?

A. That's correct.

Q. Do you have an example of how it was reported in "Reader's Digest"?

A. Yes, I do.

MR. COFER: Craig, would you put that up, please?

Q. And would you tell the jury, Professor Hoff, how the "Reader's Digest" article in January of 1950 is significant

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to your opinions in this case?

A. Again you have to keep in mind, "Reader's Digest" had been publishing anti-smoking articles since the 1920s, but here it picked up on this study even before, if you look at the code up there, even before the study was officially published.

The quote reads "This probably refers to" -- "this" was the Wynder study, Wynder and Graham study -- "This probably refers to the most extensive and reliable research yet made in this field, which is now being completed by Dr. Evarts Graham and Wynder," and again "It is expected to show that over 95 percent of the patients with lung cancer smoke a pack of cigarettes a day and have done so for many years."

What's interesting about this is not that "Reader's Digest" did this; it knows a lot of this research while it's going and before it is published.

MR. SMITH: May we approach the bench for a moment?

(Proceedings at side-bar:)

MR. SMITH: Your Honor, I haven't objected, but the way the witness is going, it's really -- this is becoming Attorney Cofer's and --

MR. COFER: Proctor.

MR. SMITH: -- and Attorney Proctor's testimony.

The question is not "Do you have an opinion?" A board pops up with an opinion that Craig puts up there. They are conducting normally direct examination, and I'm objecting to not only leading but the answer being given on the board.

THE COURT: If you have an objection that you think it's leading --

MR. SMITH: I'm raising it.

THE COURT: But, you know, you've used the same boards. You went through the same process with your witnesses. You did with Dr. Blum.

He had -- the same board was up showing the literature that was a broad showing that smoking cigarettes was dangerous.

In fact, his testimony was as early as 1939, that tobacco companies should have been publishing a warning that there was a link between smoking cigarettes and lung cancer.

I mean, but you used the same kind of exhibits to assist in the presentation of his testimony, so at this point I don't see any difference.

But if you think the question itself is leading, just object and say "leading."

MR. SMITH: I want to point out, I think there is a difference, though, because these boards, they

are pulling out whole quotes, putting them up there, having items one, two, three, four.

The time line board was not constructed that way.

THE COURT: Remember, Dr. Blum was also reading quotes. They just used a different type of

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demonstrative evidence.
You showed -- you put yours up on the screen, and they are doing theirs with a -- you put up your exhibits on the screen and had Dr. Blum read from them. Now, these boards actually show the quote and the witness refers to the quote, but in my view I don't see any difference between how it's being handled.
MR. SMITH: I'd ask the Court to consider this: When Dr. Blum was testifying, he pulled -- he selected his own ads, he put them up and then he read -- I asked him to read what they said.
Here they are putting up what they want said before she says a word.
MR. COFER: May I at least --
THE COURT: Let me turn the noise on.
MR. COFER: Okay.
(Pause).
MR. COFER: There are actually, as I see it, two ways to do this, to lay the proper foundation.

What I have done is I have all of the underlying articles from which the boards were made. I've provided copies of those to Mr. Smith, and copies of those in the report.
What I could do is go through and lay a foundation, as I did with the Every Pupil Test, with respect to each board.
I don't think I'm required to do that under Federal Rule of Evidence 1006 in that these are summaries of voluminous materials. And I think it assists the jury in understanding how those materials affect the witness's opinions in the case.
And --
THE COURT: Well, but generally, I understand that the plaintiff has an objection to the process you are using in examining the witness by use of these demonstrative exhibits which show the quote that's being relied upon.
That's your objection.
MR. SMITH: After the leading question that's coming.
THE COURT: And I will respond to any objection you make with respect to leading question, but you are objecting to the process, and that's overruled.
(End of side-bar conference).

BY MR. COFER:
Q. We were talking about how the 1950 Wynder and Graham article was reported in "Reader's Digest."
Was it also reported in "Newsweek"?
A. Yes.
Q. Did you have a board that shows how it was reported in "Newsweek" and that would assist the jury in understanding your opinions of the significance of that report to your opinions in this case?
A. Yes, I do.
Q. And, Dr. Hoff, would you tell the jury how this article in "Newsweek" affects your opinions in this lawsuit?
A. As you can see, this one came later in the year, after the report actually appeared in the Journal of the

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American Medical Association.

And "Newsweek" then is saying that based on this study, "In the past 50 years, the incidence of lung cancer has increased to the point where it is now one of the leading forms of cancer death in men."

And notice there then it also says, and of course in the article, "Last week in this journal, a survey brought this relationship out of the rumor category with statistics to show that the more heavily a person smokes, the greater are his chances of being afflicted."

In other words, when they say "out of the rumor category," it means they are saying there is now scientific, statistical evidence to back up the common knowledge about ill effects generally associated with smoking.

Q. And, Professor Hoff, I'm not sure the jury can see the date.

A. I'm not sure I can.

Q. Yes. It's at the bottom?

A. It's in June of 1950.

Q. And it says "just last week"?

A. "Last week."

The article actually appeared at the end of May in the Journal of the American Medical Association.

Q. Now, if you'll look at the time line, I don't know whether you can see it from here, but it also shows there is a Doll and Hill epidemiological study in 1950, is that correct?

A. That's true.

Q. And one in 1952 as well?

A. Um-hmm.

Q. Do you have an exhibit that shows how Ohio newspapers reported the Doll and Hill study in 1950 and the one in 1952?

A. Yes.

MR. COFER: Could you put that up, please?

Q. And, Dr. Hoff, could you tell the jury how these two newspaper articles affect your opinions in this lawsuit?

A. What's significant here is that both of these newspapers --

Q. Let me ask you, first --

A. In this case it's the same newspaper, I'm sorry.

Q. The top one?

A. Yeah.

Q. And you can step down, if you would like, if it helps you see.

Could you tell the jury the date of the top one, please?

A. Yeah, it's in December of 1950.

And so -- and the other one is in December of 1952. So they are two years apart because these two studies by Doll and Hill took place two years apart.

What's significant here is that these were foreign studies, they took place in England, and a local newspaper was picking up on them and publishing them for their readers to look at and evaluate.

And you can see there that the first quote says "A new British study says that smoking seems to be an important factor in producing cancer of the lungs."

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And then quoting the study again in '52 by these same two men, "Our estimates indicate that the risk of dying of lung carcinoma increases in approximately simple arithmetical proportion to the amount smoked."

The importance here is these were foreign studies being picked up by a local newspaper.

Q. Now, the next item on the time line is the 1953 Wynder and Graham mouse skin paint studies, is that correct?

A. Yes, it is.

Q. And do you have a board first that shows generally how this was reported in two or three different media?

A. Yes.

Q. And if you would, tell the jury just how this general publication with respect to the mouse skin painting affects your opinions in this case, please.

A. Well, this is "Life" magazine, and as I said it was famous for its pictures, and you are only seeing a portion of the pictures on this mouse study. There are about two dozen of them.

Q. In fact, do you have a board that shows more specifically "Life"? Could you put that up, please?

I'm sorry, go ahead, Doctor.

A. And the importance, of course, is that readers of "Life" could look at the pictures, and in this case Wynder and Graham earlier had just presented these dry statistics

in their 1950 study.

Here they have a live subject, that is mice, and so the pictures kind of jump out at you and much more was made, I think, and the pictures were much more influential because they involved these mice who had been painted with tobacco tar.

Q. And do you have an example of how the "Cleveland Plain Dealer" reported the Wynder mouse skin painting study?

A. Yes.

Q. And would you tell the jury, please, how this affects your opinions in this case?

A. This, the story was a kind of background piece on tobacco usage.

It was a syndicated AP story which meant it was sent out all over the country. But when the "Cleveland Plain Dealer" got ahold of it, the editor read it, obviously, and then took the trouble to put in an editor's note, which is quoted here because what the article does is present the kinds -- as it says, the pros and cons of the issue. And the editor wanted the reader to know this, and what his statement reflects is common knowledge.

"Everybody knows the old saying," that's really a reference to demonstrate knowledge, "every time you light a cigarette you put another nail in your coffin."

That's a reference to these slang terms which make up common knowledge.

"Today some medical researchers say there may be something to it. Others put up strong arguments to the contrary. Either way," the editor is saying, "there is grave concern over the question: Does cigarette smoking

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cause cancer? Here's the broad picture and the pros and cons in this spreading controversy."
Q. And, Professor Hoff, can you see the date of that paper?
A. That is January 24th, 1954.
Q. Thank you, Doctor.
The next thing we have on the time line is the American Cancer Society Hammond and Horn, 1954 study.
A. Um-hmm.
Q. Do you have a board that tells how it was reported in "Time" and "Newsweek"?
A. Yes.
Q. Could you explain to the jury, please, how this affects your opinions, in this lawsuit?
A. This 1954 study was sponsored by the American Cancer Society, and so the national news magazines of course reported on it.
And again, it is reporting this increasing statistical evidence of this linkage between smoking and

lung cancer.
So you can see there "Death from lung cancer is three to nine times as common among cigarette smokers as among nonsmokers, and five to 16 times as common among those who smoke a pack a day or more."
And then that's from "Time," but in "Newsweek," very specifically -- and "Time" did the same thing -- indicating that the American Cancer Society for the first time took official action to warn the public of the possible dangers of smoking.
"The presently available evidence, its resolution" -- that is society passed a resolution -- "indicates an association between smoking and particularly cigarette smoking and lung cancer."
That's an American study being publicized in the national press.
Q. Professor Hoff, I don't want to spend a lot of time on it, but do you also have a board that shows how Ohio newspapers reported the 1954 American Cancer Society Hammond and Horn report?
A. Yes.
Q. And again, just briefly, what about the way the Ohio newspapers reported the results of this study is significant to your opinions in this case?
A. Yeah. We have two newspapers here, the "Akron Beacon

Journal" and "The Plain Dealer," and what I found interesting, as I read these stories, is that the Akron paper in particular had very direct, concise headlines which usually condensed the entire story for the reader.
Look at that, "Men, 50 to 70 die sooner, link cancer cigarettes in new report."
So the average reader could have looked at the headlines and gotten the gist of this.
But then you can see from these quotes that they are again saying that there is an increase in heart disease and cancer among male smokers.
The quotes are fairly similar to the other ones.
Q. Professor Hoff, let's shift gears for a second.
Did you review any polling data which affect

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your opinions you are going to express in this case?
A. Well, as a cultural and social historian, once we gather the kind of information I talked about earlier, if there are polls on the subject matter we are studying -- and remember, before 1935 there weren't going to be any -- we do look at them to see if they correlate with what our generalizations are coming from other sources.
Q. Do you have a couple of polls that Gallup ran in 1954?

A. Yes. Yes, I do.
Q. And could you put the first up, please?
And would you tell the jury, first, when this -- this was January, 1954, is that correct?
A. That's correct.
Q. Tell the jury how this poll affects your opinions in this case.
A. Remember, this would have been on the heels of the mouse study reports.
What you can see there is that you've got 83% answering this question positively. "Have you heard or read anything recently that cigarette smoking may be a cause of lung cancer?"
And that, as I say, was in January of '54.
Q. Is there -- was there another poll in June of 1954 that asked a very similar question?
A. Yes.
MR. COFER: And could you show that, please?
Q. And tell the jury, just briefly, how that poll affects your opinions in this case.
A. Here in June of '54, you would have had further reports in the newspapers and, to a certain degree, on television about these scientific studies.
And now the question is: "Have you read or heard anything recently to the effect that smoking may be a

cause of lung cancer?"
And you can see the percentage jumps up to almost 90%.
Q. The next item on the time line, Professor Hoff, there's actually two matters in 1957, the Hammond and Horn American Cancer Society study, and also something that's called the seven experts study.
Is that correct?
A. That's right.
Q. First, could you tell the jury, what was the seven experts study?
A. This was a report of a panel of scientists that a man named Leroy Bernie, who happened to be the Surgeon General in this time period, he appointed this committee or this panel in 1956, and it reported to him in '57 on this very specific topic of the statistical linkage that was being shown in these studies between lung cancer and smoking.
Q. And was the seven experts' report, the results of that, published in "Time" and "Newsweek"?
A. Yes.
Q. And do you have a blowup that would assist the jury in understanding how they influence your opinions in this case? Yes?
A. Yes, I do.

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Q. And how do they affect your opinions?

A. Well, the difference here is these previous studies have been conducted either by the American Cancer Association or by scientists independently.

This was a government report, and so the two national news magazines are reporting them in this fashion and stressing that it is a government report.

"Cigarette smoking," in one case it's significant, "is indeed a major cause of lung cancer."

And then it says here "The sum total of scientific evidence up to this point," that is '57, "establishes beyond a reasonable doubt that cigarette smoking is a causative factor in the rapidly increasing incidence of human lung cancer."

And so the fact that this is a government report is what is significant about it, and the fact, of course, it's going to get national coverage.

Q. Did Ohio newspapers also cover the seven experts' study?

A. Yes.

Q. And do you have a board that shows a couple examples of those?

A. I do.

Q. And could you tell the jury how that's significant to your opinions in this case?

A. Well, again it just shows the filtering down at the

local level of this story, which in this case the local paper is quoting Bernie himself saying "There's increasing evidence that excessive cigarette smoking is a causative factor here in lung cancer."

And the other story saying this group of seven scientists in a report made public, that scientific evidence establishes beyond a reasonable doubt that cigarette smoking is a causative factor.

So they are repeating, to a certain degree, at the local level for the average reader the same information.

Q. Professor Hoff, you were talking about the seven experts' study.

Also in 1957, Hammond and Horn had the American Cancer Society study, correct?

A. Yes.

Q. And was there another poll that was taken in 1957 that asked whether people saw that specific study?

A. Yeah.

Q. And do you have that, and would you please explain to the jury how that affects your opinions in this case?

A. Well, in this instance, if you recall the earlier questions which were put up, they were quite general about have you heard or read anything.

This one is quite specific. "Have you heard

or read about the recent report of the American Cancer Society," the Hammond and Horn report, "reporting the results of a study on the effects of cigarette smoking?"

And here you have almost 80%, 77% indicating that they had heard about this specific report because of this widespread publicity it was being given.

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Q. Professor Hoff, jumping ahead to 1962, the Royal College of Physicians, first what was the Royal College of Physicians' report?
A. It was a report from a medical group, in the most prestigious medical group in England at the time, about the hazards of cigarette smoking.
Q. And do you have examples of how that was reported in the national media in this country?
A. Yes.
Q. And how is the way it was reported in "Newsweek," how does that affect your opinions in this case?
A. Well, what it shows again is that our national press is picking up on a foreign study, showing that at least the editors of "Newsweek" in this case, and the other news magazines, think that this issue is of such gravity that foreign reports collaborating -- or corroborating our own scientific studies were important enough to publish information about.
And here you see the statements becoming much

more direct. "Cigarette smoking is a cause of lung cancer, the Royal College of Physicians stated."
Q. Do you have an example of how local newspapers published it?
A. Yes.
Q. And again just very briefly, how does that support your opinions in this case?
A. In this instance, it reports the same thing that the national press is, but the local paper here, the Akron paper, picked up on the fact that in this instance, the Royal College of Physicians had asked the government to do something.
And in fact, the Ministry of Health began to distribute posters warning against cigarette smoking, and you can see the quote there about "Danger! The more cigarettes you smoke, the greater the risk from death from lung cancer." You have been warned.
So it's advocating government action and it gets government action.
Q. And, Professor Hoff, do you know when the United States Surgeon General advisory committee was formed?
A. The Surgeon General advisory committee for?
Q. The surgeon -- that ultimately came out with the Surgeon General's report?
A. It was formed in 1962, the same year that this report

was issued at the -- on the order of President Kennedy.
And it's going to report back in a couple of years later.
Q. Professor Hoff, are these examples the only media that you see, the only reports that you reviewed that talked about the link between cigarette smoking and lung cancer between 1950 and 1965?
A. No. They are simply representative of a much broader group of stories and headlines that are quite similar.
Q. Do you have a summary exhibit that shows how the link between cigarette smoking and lung cancer was reported in the "Akron Beacon Journal"?
A. Yes, I do.
Q. And again, just generally, could you tell the jury how these reports, how these articles, affect your opinions

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in this case?
A. What I've said about the "Journal" already is that its headlines were very direct and concise, and so you simply have to read them to get the gist of the story.
And these stories run from '54 through '57, and are quite to the point.
Anyone just glancing at the newspaper would have seen these headlines, even if they didn't read the story.
Q. Now, earlier you talked about the significance of

"Reader's Digest" in reporting on the issue of smoking and lung cancer.
First, let me ask you, was "Reader's Digest," did it have kind of a unique history with respect to its role in cigarette smoking and lung cancer?
A. Yes, it did. It was founded by a couple, Wallace and Lila DeWitt back in 1922, and they both were avidly opposed to cigarette smoking. So from 1924 on, it was the leading national magazine to publish anti-smoking articles.
Q. And do you have a summary chart that would show the jury just some of the articles that "Reader's Digest" published over the years about cigarette smoking and lung cancer?
A. Yes.
Q. And again, how does this affect your opinions in this case?
A. Well, again, one can just look at the headlines, among other things.
But keep in mind, these were very short articles, two or three pages that a person could read in a few minutes.
And beginning back for the time period I looked at now -- these articles against smoking were earlier than this as well, some of them were -- from '52 again down to '64, you see a series of articles, some of

them, Cancer by the Carton was a very famous one which "Reader's Digest" reprinted and reprinted and reprinted in this time period. So it didn't only show these articles or publish these articles once.
And you can see the second article there going over the controversy within the scientific profession, one of them saying "Lung cancer and cigarettes, cigarette controversy."
But then you find in '64, this very stark headline, "Cigarettes found -- tried and found guilty," very much to the point, and then the article confirming that.
Q. And of course, Professor Hoff, in 1964, that's when the United States Surgeon General's report was published, is that correct?
A. That's correct.
Q. And do you have a board that shows examples for Ohio newspapers as to how that report was published?
A. Yes.
Q. And would you please tell the jury how that affects your opinions in this case?
A. You can see here the very large headlines on the front page of these State newspapers. And again remember President Kennedy had appointed a commission, it was known

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for several weeks in advance it was going to issue its

report.

And this is the kind of strong focus and bold headlines that were representative of not only Ohio, but of the nation.

And on the bottom there, you can see a cartoon again relating to common knowledge on the subject, but standing out as perhaps more effective than even some of the headlines.

Q. I have one more board I want to show.

MR. COFER: But first, Your Honor, may I approach the witness?

THE COURT: Yes.

Q. Professor Hoff, let me show you what has been marked as PT Exhibit 1079.

This is an article from "The Plain Dealer," a special interest story, "Criticism fails to stunt weed."

Is that correct, ma'am?

A. Yes.

Q. And have you reviewed that and do you rely on that for your opinions in this case?

A. Yes, I did.

Q. Have you prepared a demonstrative that will assist the jury in understanding how that affects your opinions in this case?

A. Yes.

Q. Let me ask you this question: In 1964, was the Surgeon General's report new news?

A. Well, as I looked back at both the national and local coverage, I found that it wasn't reported as new news.

It was reported as a kind of accumulation of evidence that had been increasingly available to the public for at least the last decade or more.

And so in that sense, the report, even though it got great publicity because it was an official government report, did not, in essence, tell the average reader anything that he or she already hadn't read in these earlier stories.

But what's interesting about this demonstrative, the report itself came out on January 11th, and you can see here that's January 12th, it happens to be a Sunday, feature story on the -- on tobacco usage.

And what this story does, clearly it was in their files, they had been preparing this story either in the last couple of weeks or had prepared it over time, and it goes back and reviews common knowledge about tobacco usage, quoting James, I, quoting others from the 1600s and 1700s, going down through some famous Americans who had spoken out against tobacco usage and specifically smoking.

So that what this shows is that the editor, realizing that this report was coming out, had had one of

his reporters prepare a background piece, so reviewing common knowledge on the subject.

Q. I know the copy I gave you isn't particularly clear, but I'd like you to read, if you would, just the first paragraph or so to the jury.

And if you need to step down and use the

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board.
A. I think I can read this.
Q. Can you read it?
A. Um-hmm.
Q. Would you do that, please?
A. And the very first paragraph starts out "From the time tobacco was first smoked in the so-called civilized world, warnings have been issued about it and yet cigarettes" -- I guess I can't read it.
Cigarettes what?
Q. Let me get you a microphone so you can step down.
A. "Cigarette sales consistently reach new heights."
Q. Hello? Hello?
Would you like to step down where you can see better?
A. Yeah.
Q. All right.
A. "Cigarette sales consistently reach new heights. People call them coffin nails -- called them coffin nails

long ago not knowing just why. Now, the U.S. public health service is explaining."
And then it goes into a 1950 poem about it, it mentions Sir Francis Drake, it mentions James, I, and Edison and others who opposed it.
Talks about the 1930s, and in essence is reviewing for the reader of the "Plain Dealer" on this particular Sunday all the common knowledge that had appeared about tobacco usage and then cigarette smoking in specifically.
Q. Professor Hoff, thank you. You can take your seat again, please.
What we have talked about this morning is the basis for your opinions or the bases for the opinions that you are going to render in this case.
We've talked about the work you've done, we've talked about what you have relied on, so let's get to the opinions you are here to offer.
First question, Professor Hoff: As a professional historian, with over 30 years of experience in researching historical issues, have you formed an opinion to a reasonable degree of professional certainty, as to whether the link between cigarette smoking and lung cancer was common knowledge in the United States between 1950 and 1965?

A. Yes.
Q. Do you have an opinion?
A. Yes.
Q. What is that opinion, Doctor?
A. It's that after reviewing what was available to the average reader in a variety of media forms, that the -- there was an increased general awareness of the scientific studies, which all of which claimed to show a link between cigarette smoking and cancer, lung cancer.
Q. Okay. And, Dr. Hoff, as a professional historian with over 30 years of experience in researching historical issues, have you formed an opinion, to a reasonable degree of professional certainty, as to whether the link between cigarette smoking and lung cancer was common knowledge in Ohio between 1950 and 1965?

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A. Yes. And for the same reason.
Q. And what is your opinion, Dr. Hoff?
A. The reader of especially local newspapers in Ohio would have been apprised of, by those newspapers, about these studies, and have seen headlines directly linking cigarettes to lung cancer.
Q. Dr. Hoff, thank you very much.
That's all I have.
THE COURT: I will take a brief recess, about ten minutes.
You may file out.
(Jury out).
(Recess taken)

THE COURT: Please be seated.
I want to just direct, I want to say just generally to those that are spectators, that you are in the courtroom at my sufferance. If there is any conduct by any individual person in the audience that I find is inconsistent with a fair trial to everybody concerned in this case, that person will be excluded from this courtroom for the balance of the trial.
You may continue now with your cross examination.
MR. SMITH:Thank you, your Honor.

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CROSS EXAMINATION (CONT.)

BY MR. SMITH:
Q Doctor Hoff, would you please tell us what the definition of common knowledge is as you applied to this case?
A Yes, it's what I said before.
THE COURT:Well, wait a minute, we have to get our mike on.
A It's what I said before, it's the lowest common denominator of information that a culture or society conveys to its people.
Q You had mentioned at the end of your direct testimony regarding being aware of information and does that apply to

what you just said to your definition? I thought it was your definition, but I'm trying to find out your precise definition?
A Well, I started out in the testimony by giving the definition I just gave about the lowest common denominator of information. And then one has to show how that's conveyed to society or conveyed to a group of people. And that's usually then through some kind of mass media.
Q And when you use the phrase?
A In our day and age or within the time period we are concerned with.
Q At the conclusion, when you were asked your opinions I didn't hear you mention the phrase lowest common denominator, I heard you use a different approach I thought, and I'm trying to understand exactly where you stand on this issue.
A Well, I think I've stated it as well as I can. You have a very general low level passive kind of information that a society conveys in any given time period and that it conveys it in certain ways to increase or enhance the general awareness on that topic.

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MR. SMITH:Your Honor, may I ask the court reporter to read part of that answer back to me, or if I can look at the live time.
BY MR. SMITH:

Q Dr. Hoff, under that definition mo you have an opinion as to when the tobacco companies would have had the knowledge that we are speaking of here?
A Would have had common knowledge?
Q Yes, ma'am?
A I didn't study tobacco documents from the companies themselves, but individuals within the companies would have had the same common knowledge information and awareness as the general public.
Q That would include the Presidents of the companies?
A Assuming they were born and raised in the United States.
Q The research people?
A Yes.
Q When you you've done research regarding various things, have you done research about regarding professional organizations as well as lay people?
A I studied a number of business organizations from the 1920s.
Q Did you ever study them for the purpose of determining what they knew about something?
A I studied them largely to find out what, what committees, let's say, within the organization might have been responsible for making public statements to the Congress or to take positions, certain policy positions.

Q From doing your work, did you come to the belief that those people on those committees would acquire more knowledge than the general person on the street about the topic in which they were involved?
A I think the general answer is, yes, assuming that there was information on that general topic that went beyond what was common knowledge level.
Q Do you have an opinion as to whether or not there was more information provided to tobacco companies than there was to the person on the street regarding the question of the linkage between smoking and lung cancer, please?
A No, I don't, because I wasn't studying tobacco companies for this case.
Q And I believe that I asked you that question one time before, is that correct, when we had the opportunity to take depositions of all the experts in this case?
A Yes, you did.
Q And I think at that time that was your same, generally your same answer, is that correct?
A That's correct.
Q And you haven't done any research on that since that time or given any more thought?
A No, because I'm looking at publicly available information that was there for the average person.
Q When you did your research on this topic, did you look

at advertisements, Dr. Hoff?
A I looked at some, in these, especially in the national magazines.

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Q And would you tell us, please, your general definition of what you mean by some as you are using it right now?
A Well, I am not a specialist on advertising, but as you thumb through any of these magazines or look at them on microfilm you come across a variety of ads, yes.
Q Was that part of your focus in this case?
A No, it was not.
Q So, I want to make sure I'm stating this properly.
The opinions that you've come to in this case, under your definition of common knowledge, do not include any impact of advertisements on that common knowledge?
A You can -- as a social historian you look at ads and you realize that advertising is part of a wide variety of information that average people are subjected to or look at in the course of their daily activities in reading magazines or newspaper.
So it's a component part, but it isn't one that I focused on exclusively or to any great degree.
Q It wasn't one of the major components of your work, is that true?
A No, that's true.
Q And in fact, you selected a reasonable amount of

material, is that correct, insofar as supporting documentation?
A I believe so, yes.
Q And forgive me for a quick, if you put it on, stood it up, would it be maybe be two to three feet high, the papers?
A I don't have any idea. I, as I said, I looked at several hundred articles, I don't know how high they would stack if you stacked them. Some of them would have been on microfilm and other media.
Q Were any of the papers you collected papers that were advertisements?
A Yes. I had collected advertisements from previous cases in which I testified.
Q I'm sorry, approximately how many advertisements did you pick up in this, have you copied and put as part of your exhibits?
A Oh, I would say if I looked back at the other cases, going back to '94, maybe in my files I have a good, probably 80 to 100 examples of ads.
Q And how many of those did you submit as reference authorities for this case?
A None.
Q Might I trouble you gentlemen for the Readers Digest board, please?
MR. COFER:Which one?

MR. SMITH:The one that had the 6.
MR. COFER:Sure.
Would you like it on the easel?
MR. SMITH:Do you mind?
MR. COFER:No.
MR. SMITH:Thank you, sir.
BY MR. SMITH:
Q I took a quick -- or let me ask this question if I may.
Did you personally prepare these boards?
A Physically prepare these boards?
Q Yes, ma'am?

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A Of course not.
Q And do you know who did prepare them?
A The lawyers prepared them for me after I looked at the material.
Q And I'm going to ask you a question and I'm not trying to be cute with it but I want to make sure we are all aware of it.
These boards have yellow markings on them, is that correct, to highlight various items?
A That's correct.
Q To assist your presentation?
A Yes.
Q What I want to submit is when a person buys a

newspaper or a magazine, generally there is no highlighting on it?
A True.
Q So while we, in the presentation we make things leap out at our audience, when you read the newspaper you don't have that colored advantage generally for things to leap out at you?
A Except for the headlines'.
Q I'm saying the color advantage?
A No, you don't have highlighted headlines, that's true.
Q Or highlighted paragraphs?
A That's true.
Q I haven't went close to those but I was trying as best I could to read them, and it struck me that the middle two both indicate the cigarette controversy, is that correct?
A That's correct.
Q And that would be important to someone being aware that there was a controversy and it included cigarettes?
A Yes.
Q When you look at those six boards, it strikes me, and I may see it wrong, but that the bottom right board, which is the last board in 1964, is the only board up there where Readers Digest really seems to try in their article to put to rest what they had reported as the controversy, would that be fair?

A In reporting on the '64 report.
Q Yes, ma'am?
A Which was a report surveying earlier studies.
Q Yes. Would you agree to that?
A I think I agree to that.
Q Okay. And that is in 1964?
A Yes, it is.
Q You had indicated earlier that under your definition of common knowledge, that you felt that there was common knowledge regarding the smoking and lung cancer, the linkage, is that correct?
A That there was increased awareness of that linkage in the 1950's.
THE COURT:Ma'am, the issue is common knowledge that the ordinary person had, not increasing awareness.
THE WITNESS:Well, the common knowledge prior to 1950.
THE COURT:The reason I interrupted you is that you it seems to me you strayed away from common knowledge and introduced your own definition of what

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you think common knowledge is.
That's for me to define for the jury is the way that the legislature has set it forth in the statute. But when he asks you about common knowledge

729

Cross - Hoff

I would prefer if you would respond to him in the context of common knowledge given the shape of the law that applies in this case.
MR. SMITH:I would like to ask her this question, if I might, with the court's permission.
Q I really sense that you are giving us your honest definition as to how you have approached this through your mind, isn't that true?
A Yes.
Q Both in your report and your deposition and today?
A Yes.
Q And it is my understanding it is your belief that as the '50s progressed there was the public awareness became greater, there was more information coming to them?
A Yes, in these popularized forms.
Q And when you got into the '60s, I'm assuming you are indicating there was even more. I'm not trying to put words in your mouth, but is that true?
A Yes, in a general sense.
Q So from the period 1950 to 1965, in general, more information kept coming out, is that true?
A Yes.
Q Can you tell me approximately how many Cleveland Plain Dealers you looked at, Dr. Hoff?
A Well, I would have looked at all of them for the

730

Cross - Hoff

specific dates that corresponded to these major scientific reports.
In other words, it's fairly easy to compile a list of the reports and then using indexes to find the coverage in the newspaper.
Q You would look at, I'm sorry?
A Well, you would know.
Q Feed me on that, I'm not sure actually what you did?
A You have -- newspaper are seldom looked at physically, they are mostly on microfilm. And most of the major newspapers have indexes so that you can do a word search or topic search and find information.
And in this instance, I already knew the major events that were being reported on in the 1950's and '60's either from private scientific groups or from the government, and I would then look, sometimes if the paper is on microfilm you just scan to those dates or you can use an index.
Q And approximately how many major items did you examine from '50 to '65?
A I really don't know how many, but I would have examined all of the ones which appeared in connection with some of these reports that we have been talking about.
Q You would have looked at the numbers after the Wynder report for one thing, I'm assuming?

731

Cross - Hoff

A Yes.
Q And after the Surgeon General's report, I'm assuming?
A Not after but at that --

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Q At that time and place?
A Yes.
Q And items of that type of seriousness, is that what we are talking about?
A Yes. And again, as you look through these stories and papers, sometimes you will come across cartoons that accompany them or editorial accounts, but primarily you are looking for the newspaper coverage per se.
Q So it is my understanding that you did not endeavor to see what was coming out day by day in any city?
A No, I mean, it would be physically and mentally impossible to do that.
Q So you wouldn't want us to look at any of these newspaper articles and consider that they were a steady, daily diet for any city to receive, would that be fair?
A I think, yeah, that would be fair on these scientific reports.

You have to keep in mind that these newspaper were also publishing columns about health issues related to tobacco use and cigarettes, so those would have appeared as well on days other than when the reporting was going on about these major studies.

Q But a in good conscience you can't personally say that regarding a paper doing that if you didn't examine it?
A That's right. For example, this Akron paper, the journal had what was unusual, when I compared it to other papers I had looked at. It had dentists running regular columns, if not daily, weekly, about smoking and cancer of the mouth or lip cancer, associated with not so much exclusively lung cancer, but they spoke about it. But.

They were concerned about cancer of the mouth from smoking, and that was a little unusual because I hadn't run into columns by dentists, let's say in the Indianapolis Star or some of the California papers that I looked at.

Q But in fairness, I believe from what you said earlier, you were looking at the papers in the area where these events occurred, and those would have been the papers wherein you would have found a reference by a dentist, for instance, speaking to cancer?
A Yes. But as I would notice that I would usually look to see if it was a weekly column or not.
Q Sure, I believe you. But you wouldn't be able to determine what he had reported on in any other weeks by looking at what he was talking about when the Surgeon General's report came out on cancer and smoking, right?
A I didn't understand that question.

Q Sure. If the dentist had 52 columns a year, for instance?
A Right.
Q By your looking at his column or her column that was written at the time the Surgeon General's report came out you couldn't, in good conscience, predict what was in that dentist's other 51 weeks of columns?
A No.
Q I believe that you are aware -- excuse me one second, please.

If I may be excused for a moment, your Honor.

May I go forward?

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THE COURT:You want to show her a particular -- go ahead.
MR. SMITH:Before I read it.
THE COURT:Please.
THE WITNESS:Okay. I've read it.
MR. SMITH:May I put this on the screen, your Honor.
THE COURT:No, just.
MR. SMITH:Read from it here?
THE COURT:Put it to her as a question.
BY MR. SMITH:
Q Dr. Hoff, it is my understanding that you are familiar with Bad Habits by Burnham, is that correct? I think he was

a professor at Ohio State. You've also had --
A Yeah, that's, I think you told me that, I wasn't aware that he was at Ohio State. I think you mentioned it in the deposition.
Q Yes, I think you indicated you were aware of him?
A I read the book, yes.
Q And I thought, I believed you that that -- I was the one that threw Ohio State into it. I'm sorry.
A Okay.
Q But you were aware when you read the book when we discussed it, right?
A Yes.
Q Incidentally, your current residence is where?
A I'm living right now in Montana. I'm on leave, a research leave from Ohio University.
Q And that's for, is this the first year or the second year of Montana?
A I just moved there this summer. I've had a home there that I used for vacation purposes.
Q And you grew up there?
A Yeah, I'm from there. Its God's country.
Q Ski country, too. And the year before you were at?
A I had a fellowship at the College of William and Mary.
Q And you were there for a year?
A A year writing a book, yes.

Q This is the paragraph I would like to read to you. It's in the smoking chapter of the book entitled Bad Habits by Burnham.
"As the economic importance of the industry grew, other elements in American society deferred to tobacco industry interests. Both in the local economy and as a major means by which government's at state and federal levels raised revenue. Tobacco carried much weight in society and biased governmental officials just as alcoholic beverage taxes did.
"By the 1960's over $3 billion in taxes from tobacco were collected each year and the stake that other industries had in tobacco from farming publishing and advertising was notorious.
"In 1964, for example, after the Surgeon General condemned cigarette smoking, the tobacco industry in imposing any warnings and cigarette ads lined up support from the American Newspaper Publishers Association, the Advertising Federation of America, the Association of National Advertisers, the Radio Advertising Bureau and the National Association Of Broadcasters, as was the case with

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alcoholic beverages.

"Americans with many different viewpoints over the years developed and maintained a substantial interest in furthering the consumption of tobacco products. This

interest was greatly complicated as tobacco firms diversified and acquired many unrelated businesses in the last part of the century."

Would you agree with that statement?

A It's interesting that's the paragraph you chose to select from the book. Because when we talked about it at the deposition --

THE COURT:The question is whether you agree with it or do not agree with it.

THE WITNESS:No, I don't. Because the book has been criticized for exactly that simplistic point of view with respect to the influence of economic interests on the society in general or on the culture in general. And so while I like the book for its social history in terms of economic history, if you read reviews of the book you will see in the Journal of Social History it was criticized for this simplistic monolithic view of how companies, or firms, functioned in society and how they influence the society. So that part of Burnham's book is the weakest portion of it.

So I can't agree. It you look at the documentation it says it lined up these organizations; it doesn't say what they were lined up to do. The documentation there is practically non-existent for

that paragraph in the historical terms, so it's the weakest part of the book. That is his economic theories are.

Q He is taking a position that economic interests were too important to the -- were not that important to the tobacco industry or he's saying they were too important or?

A Well, he's trying to show, even though in the first part of book he's showing the complex way in which cigarettes became a cultural symbol and represented many things in the society, the consumer society, the industrialized society even reflected to a certain degree womens liberation in the '20's, but when he backs off and starts to talk in very general terms, as he does in that paragraph about the dominant influence of the tobacco industry over other agencies and groups in the society, he's over stressing his case and under proving it.

And it just happens to be that that's the portion of the book which was most widely criticized in, I think, all of the reviews I read.

Q Would you agree with him with the exception of the degree to which he goes?

A I can't, because that particular paragraph is if -- I don't remember seeing there may be one footnote cited, but there are not footnotes that would document his general statements in that paragraph.

Q And your experience would lead you to conclude otherwise?

A On this point of economic influence. I did a major

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economic foreign policy study on the 1920s where they, the interpretation within the history profession was that the business community dictated our policy on recognition of the Soviet Union, we didn't recognize if Soviet Union until 1933, and by going back in the business records I found that that wasn't true. That you have to look at those records you have to look at the lobbying the companies do, and it simply didn't pan out.

So that when you make economic statements about companies doing this or that or influencing this or that you really have to do very serious detailed economic research. And the problem with some social historians is that they are not trained in the traditional fields of politics and economics, as I happen to have been when I started out as a traditional historian.

And that's Burnham's weakness, he doesn't have an economic background.

Q You are not saying, I take it that there are no influences that can be exerted, other than those through lobbying?

A No, I would never make that kind of comprehensive statement, no.

Q And I believe you are also not saying that lobbying doesn't exert influence?

A True. Lobbying can influence, but again, it's -- my expert testimony here is about common knowledge, and lobbying the Congress is not necessarily going to be reflected in the information that's making up the average person's awareness of about a certain topic or subject.

Q Well, let me ask you this question, Dr. Hoff.

The tobacco industry's interest would be in the American public believing what about the linkage between smoking and lung cancer?

MR. COFER:Objection, calls for speculation.

THE COURT:Overruled.

THE WITNESS:Repeat the question, please.

MR. SMITH:Yes, ma'am.

THE COURT:Read the question back. I don't want to have it restated.

I'll read the question. The question is: The tobacco industry's interest would be in the American public believing what about the linkage between smoking and lung cancer?

THE WITNESS:Would you read it again, I'm really not clear.

THE COURT:Let me state it. Based on your research.

THE WITNESS:Yes.

THE COURT:Do you have an opinion as to the position of the tobacco industry, and in particular these four defendants, with respect to providing knowledge and information to the general public that there was a linkage between smoking tobacco and lung cancer?

THE WITNESS:I guess the answer would be no, because I didn't study the tobacco companies themselves in this time period.

THE COURT:Thank you.

BY MR. SMITH:

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Q Let me ask you this question to see if one of the document?

THE COURT:Let me ask another question.

In determining the question of whether there was a common knowledge, as you were requested to do it, did you do any research with respect to what the tobacco companies were telling the general public about the linkage, or lack of linkage, between smoking and lung cancer?

THE WITNESS:Only to the degree their statements would have been in these newspaper articles; that, and national magazine articles that we have gone over.

THE COURT:And did you find anything in your

research that indicated the tobacco companies were conceding, with respect to the issue of common knowledge, that there was in fact a linkage between smoking cigarettes and lung cancer?

THE WITNESS:That they were conceding this publicly?

THE COURT:Yes.

THE WITNESS:Obviously I ran across statements where they were asking for more studies.

THE COURT:That wasn't my question. Did they concede the linkage, in your research, did you find any tobacco company or official conceding that there was a linkage between smoking tobacco and lung cancer?

THE WITNESS:They conceded that the studies --

THE COURT:No, no, no.

MR. COFER:May I approach, your Honor.

THE COURT:My question is: Did they concede the fact that there was in truth a linkage between smoking and lung cancer?

THE WITNESS:In their public statements?

THE COURT:Yes. In their public statements. Did they agree that there was in fact this linkage between smoking and lung cancer?

THE WITNESS:All I can say is they expressed concern over the fact that the linkage had been raised

by these studies.

THE COURT:You don't want to answer my question?

THE WITNESS:I'm answering it.

THE COURT:My question is concede, not that they, that they recognized there was a controversy. Did they agree that there was a linkage between smoking and lung cancer?

THE WITNESS:No more than some of the scientists in the period that we are studying.

THE COURT:Thank you, next question.

I gather though, that their position with respect to this issue was a matter that you considered when you examined the question of common knowledge?

THE WITNESS:Very definitely, from their public statements.

THE COURT:Thank you.

BY MR. SMITH:

Q Dr. Hoff, would it be true in the articles that you pulled out that there were statements made by the tobacco industry that more research was needed?

A Yes, I recall some.

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Q Were there statements, and I'm going to --
MR. COFER:May we approach, your Honor.
(A discussion was conducted at the sidebar, off the record.)

(A discussion was conducted at the sidebar, out of the hearing of the jurors, as follows:)
MR. COFER:The thing I wanted to bring to the court's attention, because I wanted to make sure I didn't waive an objection based on prior pretrial rulings, is the portion that Mr. Smith wants to read refers specifically to the TIRC and the Tobacco Institute. Reference to those organizations have been excluded from the case.
THE COURT:They are no longer excluded, not given her testimony and the limited nature of her research which she has indicated no interest in what the tobacco companies had to say as a part of research. And I am going to let him proceed with those paperworks, and your objection is overruled.
MR. COFER:Thank you.
MR. SMITH:Thank you.
(The following proceedings were conducted in open court.)
BY MR. SMITH:
Q Dr. Hoff, I would like to direct your attention to one of the --
MR. SMITH:May I a approach the witness, your Honor.
THE COURT:Yes.

BY MR. SMITH:
Q Dr. Hoff, I would like to read to you from the Cincinnati Enquirer for July 13th, 1957, page 2. And this is taken from one of the reliance materials that you provided to us?
A Um-hum.
Q The beginning of the article, it starts off with: Causes Cancer, question mark. And then it says: "Official ads voiced in cigarette study. " And it was Surgeon General Burney saying that "there is increasing evidence that excess cigarette smoking is one of the causative factors of lung cancer."
Burney said, "the public health service favors more research to identify and try to eliminate these factors." He said, "it is clear that heavy and prolonged cigarette smoking is not the only cause of lung cancer," okay? And that's what the public would see insofar as it being related.
And then it's immediately followed by, in New York, Dr. Clarence C. Little, Chairman of the Scientific Advisory Board to the tobacco in New York.
Doctor Clarence C. Little, Chairman of the Scientific Advisory Board to the tobacco industry research committee said, "Burney's statement adds nothing to what has been known about the cause of lung cancer. It reflects

the opinions of some statisticians and the relatively few experimental scientists who have actively charged that cigarette smoking is a cause of lung cancer," Little said.

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Do you recall seeing that?
A I vaguely recall statements like that, yes.
Q Can you tell us who the Tobacco Research Committee was, please?
A It was a group put together by the tobacco industry following the Wynder & Graham mouse study.
MR. SMITH:May I approach the witness with these, your Honor?
THE COURT:Do you have a series of those you are going to present to the witness?
MR. SMITH:Yes, sir.
THE COURT:We'll take about a five minute break. We'll call for you as soon as are ready.
(The jury was returned to the courtroom and the following proceedings were conducted in open court.)
THE COURT:Please be seated.
You may continue.
BY MR. SMITH:
Q Dr. Hoff.
A Yes.
Q I would like to direct your attention, please, to the

Frank statement?
A Yes.
Q And that is the copy you have has Cleveland Plain Dealer, January 4, 1954?
A Yes it does.
Q And we've marked that Plaintiff's Exhibit 8800 but it is a duplicate of Plaintiff's Exhibit 2072, but this is your copy?
A Yes.
Q You are familiar with the Frank statement, is that correct?
A Yes, I am.
Q Are you familiar with the fact that there was a meeting of the presidents of the tobacco companies in late 1953 that led to this?
MR. COFER:Objection your Honor, beyond the scope.
THE COURT:Overruled.
THE WITNESS:No, I haven't researched tobacco company documents.
BY MR. SMITH:
Q And you have no information of what triggered the frank statement?
A Yes. As I said earlier, it was triggered by the mouse reports.

Q And after the mouse reports came out, was there another event occurred, a meeting with the tobacco people before they issued this statement?
A I don't know.
Q One way or the other.
The people that issued this statement are set forth at the bottom as the tobacco industry research committee, is that correct?
A Yes.
Q And the names of those -- or withdraw that.
I won't put you through all that. It will be on the document.

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But there are 14 companies listed there is that correct?
A I'll take your word for 14, yes.
Q And do the four defendants in this case appear there?
A I believe they do, yes.
Q Or I withdraw that. I misled you, not intentionally. One does not. Liggett is not there?
A Liggett is not there.
Q Philip Morris is there, is that true?
A Yes.
Q Lorillard?
A Yes.
Q American Tobacco?

A Yes.
Q And it's signed those three companies, it is signed with their president's signature underneath it, or something replicating their signature, is that correct?
A Yes.
Q And would you read the first paragraph to us, please?
A Okay, I'll try.
Q Or the title, I guess, the beginning?
A Well, the headline for this ad, it's an advertisement, is a Frank Statement to Cigarette Smokers.
Q And I would like to stop there for one moment. When the word frank is used, what does that connote to a historian when it sees that in a document?
A Well, in this case I had to read when I first came across it, which was years ago. You have to read it a couple of times. You don't know if it means candid or name of a person. And in this case it means, the interpretation that I gave it was that this was supposed to be a straightforward statement.
Q Candid statement?
A Candid statement.
Q And the first paragraph of that document reads what?
A "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."

Q The next paragraph?
A And you want me to continue reading?
"Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we don't believe that any serious medical research, even though its results are inconclusive, should be disregarded or lightly dismissed."
Continue?
Q Yes, please?
A "At the same time we feel it is in the public's interest -- in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments. Distinguished" -- and then it starts a new paragraph and says.
"Distinguished authorities point out," and then it lists a number.
Q If I might ask this, if we could. This part starts in bold print, is that correct?
A I can't tell from my copy. You mean the part I'm

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going to read now? It looks like it, yes, yeah.
Q Thank you.
A Continue to read?
Q Yes, please?

A All right. So it's beginning to list these points now: That "medical research of recent years indicates many possible causes of lung cancer.

"Number 2, that there is no agreement among the authorities regarding what the cause is.

"Number 3, that there is no proof that cigarette smoking is one of the causes.

"Four, that statistics purporting to link cigarette smoking with a disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists."

Q The next paragraph, please?
A "We accept as" -- I'm having trouble with the words here. "We accept" -- here we go.

"We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business."

Q And the next paragraph?
A "We believe that the products we make are not injurious to health."

And then the next.

Q That's a pretty straightforward paragraph to a historian, please?
A It is if one places it in context. What I've read up

to this point is what you would also have read in the newspaper accounts of these studies. Hammond & Horn were saying that more studies needed to be done to prove this conclusively. So this is in keeping with the state of art of the reporting on the scientific studies.

Q May I ask you this, Dr. Hoff.

Those four, you are talking about the four bullets?

A I'm talking about the entire thing I have just read, including the four bullet points.
Q Let me ask you just to focus on the four bullet points.

Did you read any other articles where those four bullet points were put together in that fashion?

A Probably not in that specific fashion, because this is an advertisement.

MR. COFER:Counsel, would you please read the statement above the four bullet points.

MR. SMITH:We read them all.

MR. COFER:I don't think the doctor read that.

MR. SMITH:If I can go forward we can come back. That was read. I had her read all 3 paragraphs.

THE COURT:She read every word.

MR. COFER:I'm sorry, I missed that.

THE WITNESS:Yes, I did.

BY MR. SMITH:
Q You say it was for advertising, it was a big ad in the New York times for one place, wasn't it?

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A It appeared in over 400 newspaper on this one day.
Q Was the full page ads in the New York times one of them, please?
A Yes, it was. And I don't know if the jury can see this, but you really do have to read into this to get any indication of what it is about. And it isn't a great ad, I don't think, if you wanted to attract attention to it. Because it requires quite a bit of reading into the text.
Q You wouldn't put much truck in it?
A I wouldn't say that. It's an ad, and compared to other ads with pictures or with dramatic kinds of captions, it's fairly dull, and a reader would have to read it or the average person would really have to read this text to understand what's being said.
Q Let me ask you this question. Being a historian and having a doctor's degree and had a lot of different roles in life, would that be a fair statement? You are a sophisticated person?
A Okay.
Q Would that be fair?
THE COURT:I don't think she's required to answer whether she's sophisticated.

MR. SMITH:I withdraw it.
Q Here is my question to you. From your reading of that article, was there any doubt in your mind as to the position the tobacco industry was taking?
A As of 1954 it was in keeping with much of the reporting on these studies.
Q So it is a an appropriate position for them to say, for instance, we believe the products we make are not injurious to health. You think that was an appropriate statement for them to make after the Wynder studies?
A I really can't comment on the appropriateness of the statement. I think in light of the Wynder study and the inconclusiveness of some of the statistics of these reports which these scientists themselves were commenting on, it was a position that a maker of cigarettes would take. But I'm not sure how appropriate it was. Because a value judgment on my part.
Q Anything further on that, I'm sorry?
A The only thing, I've studied this a lot and I, quite frankly, think that the average reader would not have looked at the text because it just required too much reading and too little enticement to read it.
Q Pretty ineffective ad?
A Well, it was a one day ad. Who knows how effective it was.

Q If you would please read the next paragraph?
A We always have and always will cooperate closely with those whose tasks it is to safeguard the public health.
Q And the next paragraph?
A "For more than 300 years, tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."
Continue?
Q Yes, please.
A "Regardless of the record of the past, the fact that

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cigarette smoking today should even be suspected as the cause of a serious disease is a matter of deep concern to us. Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. And here is the answer."

And then you have three points being made.

"We are pledging" --

Q This would be with a 1?

A Yeah, "Number 1. We are pledging aide and assistance to the research effort," I can't read that word. Can you read it?

Q I believe my copy?

MR. COFER:Into.

A All right. "Into all faces of tobacco use and health. The joint financial aid will of course be in addition to what's already being contributed by individual companies. For this purpose we are establishing" --

BY MR. SMITH:

Q This would be number 2, right?

A "Number 2. For this purpose we are establishing a joint industry group."

THE COURT:Consisting.

THE WITNESS:Consisting.

BY MR. SMITH:

Q Initially?

A "Initially of the under."

THE COURT:Undersigned.

MR. SMITH:Want me to give you a better copy?

THE WITNESS:Yeah.

A "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as the Tobacco Industry Research Committee. "In charge of the -- this is number 3. "In charge of the research activities of the committee will be a scientist of unimpeachable integrity and national reputation. There will be a advisory board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science and education will be invited to serve on

this board. These scientists will advise the committee on its research activities."

And then the final statement is, this statement or final words are. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

BY MR. SMITH:

Q Thank you.

The next one I would like to ask you to read from is what you've, you selected in your to support, you selected as a reliance material, and it's from, I believe that's the New York Daily News?

A Daily News, this one is, yeah.

Q April 15th, 1956, page 26?

A Um-hum.

Q If you would please read mt starts off at the top it says, "isolate small cancer factor in cigarette tar."

MR. COFER:Excuse me, Russ, where is this?

MR. SMITH:Yes, sir. Here.

THE COURT:It's the last page of what you have been handed.

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MR. NANCE:Exhibit Number?
MR. SMITH:8801.
Q It concludes with this, wants more information, do you see that sort of headline there or, you know, topic line?

A Okay. A subhead, yes.
Q Subhead, I'm sorry?
A Yes.
Q If you would read what that says, please?
A This is at the end of the article, so anyone reading it would have had to finish the article.
Subhead is "Wants More Information. Timothy V. Hartnett, Chairman of the Tobacco Industry Research Committee said yesterday that reports from Atlantic City linking animal cancer to tar recovered from tobacco do not warrant conclusions on the causes of human lung cancer. Although the findings contribute to the to the study of this complex subject Hartnett said, much more information is needed. He said that the tobacco industry will continue to support research by independent scientists to get the facts about tobacco use and health. Thus far the industry has allocated $1.5 million."
BY MR. SMITH:
Q Dr. Hoff, based on the numerous papers that you've looked at on this topic and the fact that you have testified in three other cases?
A Yes.
Q And you've been involved in how many others, approximately?
A Just those three.

Q The only ones you were involved in went to trial?
A Yes, I was involved in one that didn't go to trial.
Q And your involvement has been with the representing or testifying or being requested to review and examine the material by the tobacco companies, is that correct?
A Yes, on the subject of common knowledge.
Q And you've testified as an expert witness and were called to the stand by them?
A Yes.
Q And I'm sure during the course of that you've had access to any material you wanted to review, would that be a fair statement, within reason?
A I think so. Any material I requested to be supplied to me, yes.
Q Did the attorneys supply you with material over time?
A Initially my graduate students did.
Q And then afterwards?
A At times the attorneys would supply, depended on where I was. If I were in Indiana University with a legion of graduate students, they provided the bulk of the information. At Ohio University I had graduate students that helped me at William and Mary. Last year I didn't. So it would depend on my own situation. Because full professors normally use graduate students to collect information for them on any topic they are searching.

I hate to disabuse the audience of the fact that we can always conduct our own research. We direct it, but we can't conduct it.

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Q The research you received or the papers you received basically would have come from research, I mean students, or from the attorneys representing the tobacco companies?
A Yes, after I advised them what I was looking for.
Q In all the papers that you saw, did you ever see the tobacco industry or the tobacco companies ever change their position that more research was needed?
A In this time period?
Q In any time -- in this time period for one, but have you ever seen anything to that extent? Ever see it happen?
A Probably not in the sense they were consistent in asking for further research.
Q And did you -- or withdraw that it's been covered.
I would like to please go to Exhibit 8802, which is a paper you supplied as a reliance document from the Cincinnati Enquirer dated June 7, 1955. It's page 19?
A Right. I have it.
Q If you would please read the last paragraph to us?
A Again, this is the last paragraph of a long article. The headline of which --
Q And forgive me. In fairness to you, and you have used that as a point to indicate that the public this wouldn't

have as much impact on the public?
A That's true, because it appears at the end of the public -- the reader would read the headline and first couple of paragraphs. Normally, unless it is an unusual average reader.
In the last paragraph, which is a repeated in a lot of articles I looked at, they quote in the last paragraph the representative of the tobacco industry. And this says a spokesman for the tobacco industry declared that the American Cancer Society study did not establish, did not quote establish a cause and effect. I think that's a typo. Cause and effect relationship between cigarettes and lung cancer. And said the statistical study ignored many factors which might affect disease and longevity.
And this was from 1955 on page 19 which meant the reader would have had to have gone to page 19 to read it.
Q In all the papers that you reviewed on this topic that were supplied to you, either at your requests or the graduate students or through lawyers, did you ever see any papers that indicated whenever anything came out by, from a scientific article, tying cigarette smoking to lung cancer that she should prepare a response to diminish the impact or to create doubt or create confusion or to keep the controversy going, did you ever see anything to that effect?

THE COURT:I don't know that you have defined who these they is counselor.
MR. SMITH:I'm sorry, your Honor.
Q Either the people who were in charge of the Tobacco Industry Research Committee, or the people who were in charge of the Tobacco Institute, or any of the tobacco companies.
Did you ever see anything along that line, first off?
A Along the lines of -- just repeat it for me.
MR. SMITH:Yes, ma'am.
THE COURT:Why don't you restate the question,

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it was a pretty prolonged question, and I think in all fairness to the witness you should restate it.

MR. SMITH:I'll try to do a better job.

Q Did you ever, with respect to these particular entities we are talking about, in the papers you examined, did you ever see one that indicated that it was a goal or it was desirable or that they wanted to keep the controversy going? Or to create doubt, or to challenge whatever new science came up linking smoking to lung cancer?

A Well, you are asking several questions there.

THE COURT:It is a pretty compound question. I don't think it's fair to the witness.

MR. SMITH:I'm sorry.

Q Did you ever see any articles?

THE COURT:Break it down so that it's more understandable.

MR. SMITH:Yes, sir.

Q Dr. Hoff, did you ever see any articles from those groups?

THE COURT:See those groups again, we have a problem. I'll tell you what, it's 12:00 o'clock, you are tired, she's tired, I'm tired, the jury is tired. We are going to take the recess at this time. We'll start at 1:00 o'clock.

MR. SMITH:Yes. Thank you, your Honor.

(Luncheon recess.).

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL., Plaintiffs, vs. AMERICAN BRANDS, INC., ET AL., Defendants.	)	Judge David D. Dowd, Jr. Akron, Ohio Civil Action Number 5:94CV1302

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY

ON THURSDAY, SEPTEMBER 27, 2001.

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VOLUME 4-PM
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AFTERNOON SESSION
(Jury in).
THE COURT: Please be seated.
Please continue.

CROSS-EXAMINATION OF JOAN HOFF (RESUMED)

BY MR. SMITH:

Q. Dr. Hoff, in your time that you have been involved in your research regarding the history of this issue and looking at the various papers that you have seen, have you come across any papers from either the Tobacco Institute or the Tobacco Industry Research Committee, or the Council for Tobacco Research, or any Hill & Knowlton documents, a public relations firm --

A. You mean internal documents from these groups?

Q. Well, they might be, or they could be external, but I think there is a good chance they would be internal, but I can't, in all good conscience, say they wouldn't be external either.

A. No is the answer. I have -- as I said, I haven't looked at internal documents because it doesn't relate to common knowledge.

Q. Have you ever come across -- withdraw that.
You have seen documents from the tobacco companies?

A. I've only cursorily searched the Internet in looking

at some of these documents, but they weren't -- I didn't include any of them in my research because I'm here to talk about common knowledge, and private documents do not affect common knowledge.

Q. And let me ask you this question: Have you ever come across the word "Controversy" in your work in these cases?

A. Of course.

Q. Have you ever come across the concept or the phrases that any of the tobacco companies or any of these other entities that I mentioned, Tobacco Institute, Tobacco Institute Research Committee, Council for Tobacco Research, wanted to do things to keep the controversy going?

A. I think you referred to that earlier, and I think my answer was -- was controversy was used by practically everybody who wrote about or did these scientific studies on tobacco in this time period.
So controversy was a common word.
The scientists themselves on either side of the issue used it. So the -- I don't know -- controversy is there, in the material I looked at that was having an impact on common knowledge.

Q. And the controversy existed in the exhibits that we looked at just a little bit ago where the top part of the argument -- of the article would indicate there was a problem, and the bottom would indicate we needed more

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research?
A. Right.
But I think your question was that, to back up, was whether or not this was a deliberate attempt by the tobacco representatives of industry to keep the controversy going.
And the answer to that question is no, because the controversy existed, generally speaking, in the public pronouncements on this subject, whether it came from the scientists or the tobacco industry or from individuals who were interviewed on the subject.
Q. Let me ask you this question, so that I'm clear what you just said, Dr. Hoff.
Did you just -- or let me ask you something, if you are saying this. Are you saying that it is your opinion that the tobacco companies were not attempting to keep the controversy going?
Do you have -- is that your opinion?
A. You're asking me a question that is outside of my area of expertise, because to answer that, one way or the other, one would have had to have examined, I guess, these internal documents you seem to be referring to, which I didn't.
Q. So then you are telling me you do not have an opinion as to whether or not the tobacco companies were attempting

to keep the controversy going?
A. I have this opinion: That to the degree that scientists --
Q. If I might just ask you, because I really, I'm on a time clock, and when I run out of 1200 minutes, I may be done.
So my question to you is this: Can you answer that yes or no; do you have an opinion as to whether or not the tobacco industry or any of its companies were attempting to keep the controversy going?
A. No.
Q. Okay. You don't have an opinion one way or the other?
THE COURT: That's what she said.
MR. SMITH: Okay. Thank you.
Q. Let me ask you this question: Have you ever heard of the Tobacco Institute?
A. Yes.
Q. And would you tell us, please, what the Tobacco Institute is?
A. Again, it was an organization or an entity put together by the tobacco companies to basically fund -- in some cases fund research or publicize the position of the tobacco companies.
Q. Did you think that the Tobacco Institute was doing

research? Did someone indicate that to you?
A. No. I'm trying -- I'm thinking of the research council itself, but the institute was a, I think, a more ambiguous entity that was created by the industry.
Q. Would you agree that the Tobacco Industry Research Committee started out doing both public relations of lobbying and had a research function originally?
A. I didn't research the activities of that council, no.

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Q. Okay. But it is your belief that at least one of the things that Tobacco Institute did was lobbying, is that correct?
A. No, you asked me -- you didn't ask me about lobbying. I don't know if they did lobbying.
Q. Did they do public relations?
A. I think they did some PR work because they are quoted in some of these statements.
Q. Did they issue press releases?
A. As far as I know, they did, yes.
Q. Did you ever see any of their press releases?
A. Only as they might have been reported on in this mass media material.
Q. And the mass media material that you saw in the year 1961, did you see any material in the mass media that would support there being a press release issued by the Tobacco Institute wherein George V. Allan, the president of the

Tobacco Institute, said "The tobacco industry has an obligation to see that the public is not hoodwinked."
Mr. Allan said "We must learn to distinguish the real facts about tobacco from unjustified emotional campaigns based on the health scare technique, a technique that was not successful 100 or 300 years ago, and we are confident will not be successful today."
Do you recall coming across that statement?
A. I don't recall that.
MR. COFER: Excuse me. Your Honor, may I have a continuing objection to the Tobacco Institute questions and the TIRC --
THE COURT: Very well, have a continuing objection.
MR. COFER: Thank you.
THE COURT: Which is overruled.
Q. In the year 1959, do you recall seeing any newspaper articles or being made aware of any press release by the Tobacco Institute that said -- or it was by, first off, at that time James P. Richards, president of the Tobacco Institute, in response to requests for comments on an anti-smoking resolution now before the American Public Health Association in Atlantic City, quote, "The American Public Health Association resolution is obviously the result of another effort by the anti-smoking group to get

other backing for its anti-tobacco campaign"?
"In view" -- then it goes on, "The American Public Health Association resolution does not claim that a causative relationship exists between smoking and lung cancer, and does not mention the many other factors being investigated. In view of these facts, this resolution can be viewed only as another step by the anti-smoking group that since 1954 has been trying to get other organizations to support its extreme stand against tobacco."
Do you recall that?
A. Where was it published?
Q. It was a press release from the Tobacco Institute of October 22nd, 1959, immediate release, and it was released from their offices in New York City?
A. My question is where was it published?
Q. I don't know that.
A. I don't either. In other words, the newspapers I

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would have been looking at could or could not have carried that, but you don't know from a press release whether or not it ever appeared, especially in the Ohio newspapers.
Q. So you are indicating to me, first off, you never saw it and, secondly, you are challenging whether it ever appeared?
A. I never saw that particular press release.
I saw statements, as I've indicated, in the

bottom of most of these major articles on these scientific studies by representatives of the tobacco industry, some of which sound a little like that.
But this one is very specific on a resolution, and the chances of that being major news, even in these stories we have gone over, is not too probable.
Q. Do you recall this press release or seeing this in any newspaper article, from the Tobacco Institute:
"Washington: The Tobacco Institute today issued the following comment on the opinions expressed by Drs. Wynder and Day in their article published in the Journal of the American Medical Association: 'Careful readers will see that the authors offer no new findings or no new scientific results to support their opinions set forth in this article. These same views have been expressed by Dr. Wynder repeatedly over the past few years and are a subject of much disagreement in the scientific world. The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown, and are the subject of continuing extensive scientific research by many agencies.'"
A. What was the date of that release?
Q. March 17th, 1961.
A. All right. I just, again, to put it in context --

Q. I guess first off I want to ask you -- and then I'll let you say whatever you want.
A. Okay.
Q. If -- do you recall seeing it?
A. As that, the complete press release?
Q. Or a portion of it, even.
A. I'm -- I have seen similar statements in these stories we have been talking about.
I don't recall seeing -- ever seeing a complete press release. Those would have gone to the newspapers and then been culled for publication.
Q. Do you recall seeing parts of that, as best you recollect?
A. Similar wording, but I couldn't say it was from that press release.
MR. McLAUGHLIN: Can the witness now finish her answer, Your Honor?
Q. Say anything you want. I'm sorry.
A. Again, I think you have to remember that I'm reporting to you as an expert witness on what was published in newspapers and magazines that the average person might have read.
The average person would have never seen a press release from the Tobacco Institute as a press release, because they were never carried in toto or

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completely in any of these popular media publications.
And language, sometimes similar language could be found at the bottom, buried at the bottom of some of these longer newspaper articles, but certainly no newspaper I know of carried a complete press release as you've read them to me here today, issued by the tobacco industry.
Q. So what you are indicating to me is they might report part of it and they might cut part of it?
A. Exactly.
Q. And what -- I guess what is a press release?
A. A press release is something that any organization can hand out to newspapers, to magazine editorial boards, to television stations, but the question that you have to ask yourself as a social historian is were they published or were they aired.
Q. Would you go one step at a time with me?
I want to let you say anything about this one, too, but just for clarity, a press release is something that was issued by an organization, is that correct?
A. Yes.
Q. That's true, right?
A. Right.
Q. And the purpose for issuing press releases is why?

A. To get publicity, but it's no guarantee.
Q. No. No.
That's the purpose, right? I'm going to let you say whatever you want. Please just bear with me.
A. All right.
Q. And when they come out of Washington, D.C., a lot of those organizations issue those press releases nation-wide?
A. Yes.
Q. And how do they get them out nation-wide?
What's the mechanics of it?
A. It used to be by teletype, and now it's by electronic means.
Q. So it's not all that difficult to have them go nation-wide when they are issued, is that true?
A. That's true.
Q. Now, you can say anything you want, please. Thank you for your patience.
A. I don't have anything else to say except a press release is a press release is a press release. There is no guarantee it will be used.
I had several national organizations issued press releases which never saw the light of day. So having a press release doesn't mean -- it isn't any indication of how widespread it was actually used across the country.
Q. Thank you.

I'd like to ask you this question: In the year 1958, did you come across any newspaper articles to support this or did you come across the press release from the Tobacco Institute, it's captioned "Richard says article not in accord with fact. Washington. James P. Richards, president of the Tobacco Institute Inc., today charged that the July "Reader's Digest" article entitled 'The Cigarette Industry Changes its Mind' is not in accord with fact. In

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a letter to DeWitt Wallace, editor of the "Reader's Digest," Mr. Richards said the cigarette industry has not changed its mind. Our position was and is based on the fact that scientific evidence does not support the theory that there is anything in cigarette smoke known to cause human lung cancer."
A. Where was that published?
Q. Ma'am, I don't know. I mean, I --
A. This is another press release then?
Q. Yes, ma'am. That's exactly, that's all it is. Might have wound up in the "Barberton Herald," for all I know, but I -- but it's the press release.
Do you recall anything about the press release or seeing that article in any newspaper?
A. As I said, I haven't seen press releases coming from the industry per se as you are reading here, and I'm assuming that I would have seen, had "Reader's Digest"

published it, or "Reader's Digest" perhaps made it a letter to the editor, but not to my knowledge, I don't think they did.
Q. And do you recall any -- seeing anything in that time period -- and when I say that, it was exactly on June 25th, 1958 --
A. Yes.
Q. -- and it says in a.m.'s of Wednesday.
In press release language, what does that mean when they say "in a.m.'s of Wednesday, June 25th, 1958"?
A. I would assume it's referring to the morning.
Q. Trying to get it there so they can have it in their morning paper if they want to use it, is that true?
A. Um-hmm. Yes.
Q. I believe you indicated in your deposition that you were aware of the fact that tobacco companies in 1964 made a large grant to the American Medical Association, is that true?
A. I think we talked about that, yes.
Q. And I think you indicated you were aware of it?
A. Yes.
MR. COFER: Objection, Your Honor. Relevance and beyond the scope.
THE COURT: Well, I don't permit questioning

about depositions unless it's for the purpose of refreshing recollection or impeaching the witness, but just to start off talking about what she said previously in a deposition is improper examination.
The objection is sustained.
Q. Dr. Hoff, are you familiar with the fact that the American Medical Association made a large grant -- or received a large grant, forgive me, from tobacco companies in 1964?
MR. COFER: Objection. Relevance.
THE COURT: Sustained.
Q. Okay.
MR. SMITH: That's all I have, Your Honor. Thank you.
THE WITNESS: Thank you.
MR. COFER: I have a few questions, Your Honor.

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THE COURT: Proceed.

REDIRECT EXAMINATION OF JOAN HOFF

BY MR. COFER:

Q. Professor Hoff, you were asked about certain press releases that the Tobacco Institute had, and I believe you told Mr. Smith and the jury you weren't sure whether the press releases themselves were ever published.

Is that fair?

A. That's correct.

Q. And Mr. Smith asked you about -- he did ask you about a publication called "A Frank Statement to Cigarette Smokers," is that correct?

A. Yes.

MR. COFER: Mr. Smith, do you know the Exhibit Number on that?

MR. SMITH: I can find it.

MR. COFER: No.

MR. SMITH: I'll look.

THE WITNESS: I think I have it.

Q. Okay.

MR. SMITH: That's one of them. There's really two.

Q. What is it?

A. I have Plaintiff's Exhibit 2072.

MR. SMITH: And there is another exhibit for the one she was supplied. There's two numbers.

MR. COFER: Okay. We've got this. Thanks.

Q. The fact is "A Frank Statement to Cigarette Smokers" was published, correct, ma'am?

A. Yes.

Q. Could you tell the jury where it was published?

A. I think I mentioned earlier it was published across the country in over 400, I think it was 443 or '48,

newspapers on one day in January, 1954.

Q. January 4th, 1954?

A. January 4th, 1954.

Q. Full-page ads?

A. Full-page ads.

Q. And the sponsors included three of the defendants in this lawsuit, is that right?

A. Yes, that's true.

Q. Philip Morris, Lorillard and American?

A. Um-hmm.

Q. Do you have that in front of you?

A. I do now, and I can read it. I mean, I can see the names now.

Q. Would you read to the jury the first paragraph of "A Frank Statement to Cigarette Smokers," please?

A. Yes. It reads "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."

Q. Now, who brought that to the public's attention in this ad?

A. This is the Tobacco Industry Research Committee.

Q. But the sponsors were Philip Morris --

A. The sponsors were the various tobacco companies. I think it was said earlier there were maybe 14 of them.

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Q. But it includes the American Tobacco Company, Philip Morris and Lorillard, defendants in this case, is that correct?
A. That's correct.
Q. Would you read to the jury the second and third paragraphs of the Frank statement?
A. All right. Second one begins "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive, should be disregarded or lightly dismissed."
Q. Thank you.
And I showed you the science time line on direct examination that talked about the various studies in the fifties?
A. Um-hmm.
Q. Is it fair to say that as the 1950s progressed, that we, as a society, learned more about the link between cigarette smoking and lung cancer?
A. Yes, it -- it's fair to conclude that.
Q. During the fifties, at various points in the fifties, were there people who believed that the -- or said that the existing evidence was sufficient to conclude that cigarettes, in fact, were a cause of lung cancer?

A. Yes.
Q. Were there scientists at various points in the 1950s who said, in fact, it was their view that the evidence was sufficient to prove that cigarette smoking causes lung cancer?
A. Yes.
Q. Were there people at various points in the 1950s who said they did not believe that the evidence was sufficient to prove that cigarette smoking causes lung cancer?
A. Yes.
Q. And were any of those people independent, outside scientists not employed by the tobacco companies?
A. That's true.
Q. There was a couple questions about the opinion that I asked you to give, and whether I asked you to use the language that's appropriate for this case.
So I'm going to ask you those opinions again, and I'm going to use the language from the Ohio statutes, okay?
A. All right.
MR. SMITH: Object.
THE COURT: Well, you saw fit to repeat her and put it on the board, what her statement was, and I gather now, given that cross-examination, the counsel for the defendants wants to clarify her testimony.

I'll permit that to go on.
MR. COFER: Thank you, Your Honor.
Q. Dr. Hoff, as a professional historian with over 30 years of experience in researching historical issues, have you formed an opinion, to a reasonable degree of professional certainty, as to whether the link between cigarette smoking and lung cancer was recognized by the ordinary person with the ordinary knowledge common to the

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community between 1950 and 1965?
A. Yes, I have.
Q. And what is that opinion, Doctor?
A. That the ordinary person or average citizen had been made aware through the mass media of this link because of the popularization of these scientific studies that began in 1950 and continued throughout the decade of the fifties.
Q. Would your answer be different if you were considering --
MR. COFER: Excuse me, Mr. Smith.
MR. SMITH: I apologize. I didn't mean to, I'm sorry.
MR. COFER: That's all right. I wanted to make sure she wasn't distracted.
MR. SMITH: I'm sorry. I know it was distracting.

BY MR. COFER:
Q. Professor, would your opinion change if the ordinary person was defined as someone living in Ohio or someone living in the United States in general?
A. Not really.
MR. COFER: Thank you very much. That's all I have.
THE COURT: Any recross?
MR. SMITH: Briefly, Your Honor.
RECROSS-EXAMINATION OF JOAN HOFF
BY MR. SMITH:
Q. I was trying to -- I made noise, too, but aware of the -- what was the verbiage?
A. What did I just say?
MR. COFER: Here is the statute, if you would like.
MR. SMITH: No, just the verbiage she used.
THE COURT: He's not interested in the statute. He's interested in what she said.
MR. COFER: I'm sorry.
MR. SMITH: It will be in the record. I won't --
Q. Under the definition that you used earlier, I want to ask you whether, when the Frank statement was issued -- which is 8800 and there's another number for the same

exhibit -- does that indicate to you that the tobacco companies had the knowledge, the Frank statement?
A. They had the same knowledge that these scientific reports had, which were being condensed and popularized for the average person.
Q. And I have one last question, Doctor.
Dr. Hoff, I'd like you to please -- you were rereading, there were some areas from the Frank statement.
A. Um-hmm.
Q. If you would go Column 1, please, I would just like to ask you to read the last two short sentences, please. On the left-hand column?
A. Of Column 1, fine.
Q. Yes, ma'am.
A. These are the -- there are two sentences each in a paragraph by itself.
"We believe the products we make are not

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injurious to health," and then the last sentence in that column, "We always have -- have and always will cooperate closely with those whose task it is to safeguard the public health."

MR. SMITH: Thank you.

MR. COFER: I have nothing further, Professor Hoff. Thank you very much.

(Witness excused).

MR. COFER: Your Honor, I request interim argument at this time.

THE COURT: Members of the jury, in lengthy cases such as this, I give the lawyers the opportunity to engage in what's called interim argument. I limit it in terms of the amount of time, but I have found by way of experience that where I allow interim argument, it assists the jury in evaluating what's going on in the case.

And I -- I recognize that I have a far better grasp of what's going to come in than you do because of all the work I have had to do pretrial in getting this case ready for trial. So I'm reasonably conversant with most of everything that's going to happen in the trial. You are not.

And I find that interim argument does help the jury.

Now, interim argument means that the lawyers are now going to argue their respective positions. And you are to accept it as argument; not like an opening statement.

Interim argument is designed to persuade you to a point of view, and the defense has requested interim argument. And after the defense concludes his interim argument, which cannot exceed five minutes, then if the plaintiff wishes to use some of her time for interim

argument, the plaintiff may do so or the plaintiff may decide to defer.

But in any event, we will begin the process now.

Mr. Cofer.

MR. COFER: Thank you, Your Honor.

Good afternoon, members of the jury.

Yesterday, Dr. Blum told you that using hindsight, the case was closed in 1939.

That's like saying after the pass is intercepted, the quarterback should have known he shouldn't have tried to complete that pass to that receiver at that time. It is a classic Monday morning quarterbacking.

Dr. Hoff told you it is the opposite of the historical method, and it is absolutely contrary to historical analysis, which tries to put us back in the past in the context of the times, so we can judge the decisions that people made based on where they were, and the information they had.

Dr. Smith yesterday told you that in order for there to be common knowledge, people had to have made up their minds about what they were hearing and reading and seeing.

Dr. Hoff told you that in her opinion, there is a difference between common knowledge and belief.

The fact is, you can't make people believe

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anything. And I'll give you an example. A good argument to be made right now over the last several years, the New York Yankees are the best team in baseball. I promise you there are many Cleveland Indian fans, Atlanta Brave fans and New York Mets fans who would never believe that, regardless what facts you told them.

The thing about our country is people are free to believe what they choose to believe, and no one can make them believe otherwise.

Belief is subjective. Knowledge is objective.

We can determine what common knowledge is by examining what people were reading, hearing and seeing, and by what they were saying when they were asked questions in Gallup polls.

Thank you very much for your attention.

THE COURT: You may proceed.

MR. SMITH: Thank you, Your Honor.

Ladies and gentlemen of the jury, very briefly, we have a total of 45 minutes for interim arguments, and I don't think I am going to require very much time for this one.

First of all, the -- if you recall the distinction between having heard -- the report of someone

seeing a UFO is entirely different between believing that there are UFOs.

And no matter what the testimony in this case, no matter how intricate it may be attempted to be made, it's very simple if you'll keep grounded in a few concepts. Just having heard of something doesn't meet the test for common knowledge.

The test for common knowledge is knowing that it's there, recognizing the specific link between smoking and lung cancer. When people don't believe that or don't have an opinion on it, they haven't arrived at that level. And that's one of the reasons we brought in -- you will judge his qualifications but I will submit to you he was a very well-qualified individual, Dr. Smith.

Dr. Blum's testimony dealt with warnings. He testified if you looked back, the case is closed. He also testified, looking forward from '39, that a reasonable manufacturer should have been aware of the risk.

What the defendants want you to do is to say that David Tompkin would have common knowledge if he heard of the risk; they would have no common knowledge unless they knew beyond a reasonable doubt; and they would have no duty to warn unless they knew beyond a reasonable doubt.

And that's -- they want to put a hundred percent standard for their conduct and knowledge, and a

very low standard, a 5% standard or a 20% standard, on what would be required of David Tompkin. And I'm going to submit to you that that is contra to everything we know.

Are we supposed to judge the safety of what we buy? Are we supposed to have the knowledge of it, or is the knowledge, the people with the greater knowledge, the ones making it?

And I submit to you that's just common sense, and you all have it.

Thank you.

THE COURT: Thank you.

Please call your next witness.

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MR. SMITH: Dr. Wilson, Your Honor.
THE COURT: Do you want to see if he's here, please?
MR. SMITH: Yes, sir. And if not, we will play the video, with the Court's permission.
(Pause)
DANIEL WILSON,
of lawful age, a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION OF DANIEL WILSON
BY MR. SMITH:
Q. Will you state your name, please, sir?

A. Daniel Kevin Wilson.
Q. And your address, please?
A. [DELETE]

Q. And your occupation, sir?
A. Physician.
Q. And, Dr. Wilson, would you tell us, please, when you graduated from medical school?
A. 1984.
Q. And you did your internship and residency where, please?
A. At Cuyahoga Falls General Hospital in Cuyahoga Falls, Ohio.
Q. And I should also ask you, you graduated from medical school where?
A. The West Virginia school of osteopathic medicine in Lewisburg, West Virginia.
Q. And you practiced in Cuyahoga Falls from when to approximately when?
A. From June of 1990 to September of 1992.
Q. And you practiced in your field at that time was what?
A. I was certified and board certified in family medicine, and I was employed by GCO Family Medical Group based in North Main Street in Akron, Ohio, at an office

that they had on Graham Road in Cuyahoga Falls.
Q. When you left there, you went where to work?
A. When I left here, I closed that practice, I went to Pennsylvania to practice emergency medicine full-time in Clarion, Pennsylvania.
Q. Did you grow up in Pennsylvania?
A. I'm sorry?
Q. Did you grow up in Pennsylvania?
A. Yes, I did. Yeah.
Q. And do you have a new board certification?
A. Yes, sir, I do.
Q. And it is in what field?
A. That's in the emergency medicine.
Q. And I understand you love doing emergency medicine?
A. Yes, that's my first love, yeah, uh-huh.
Q. Approximately when -- or you can look at your records, but when or approximately when did you first meet David Tompkin?
A. I met him first on the 22nd of June in 1990.
Q. And what role -- would you have the role of his family physician at that time?

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A. Yes.
Q. And I want to -- I'm going to try to shortcut this as best I can because of the time limitations that we have.
During -- you were his physician from when to

when?
A. From June of 1990 until I left the practice in September of 1992.
Q. And it's my understanding that the primary care was regarding he had trouble with his low back from time to time?
A. That's correct.
Q. During that period of time, did he have any difficulty with his lungs of which you were aware?
A. The first time he had mentioned any lung or chest difficulties was in -- excuse me a moment, I'm sorry.
Q. That's okay. You take your time.
A. This was in March, March 27th, 1992.
Q. And was that some discussion of pain in his right breast area?
A. That is correct.
Q. Did you then or subsequently refer him to an oncologist for evaluation?
A. Yes, sir. If it pleases the Court, I -- I treated him initially for some pain in his chest, and he did not improve.
Then I sent him to a surgeon for evaluation because he had an enlargement in his right breast area. And then from there, he was referred to an oncologist after we did some subsequent tests.

Q. Okay. And I think he went to the tumor board in Cuyahoga Falls and they were not able to determine the primary site, and sent him to Dr. Haas who made the diagnosis, is that your understanding from your records?
A. That's correct. Um-hmm.
Q. Is that correct, sir?
A. That is correct.
Q. Okay.
MR. SMITH: That's all I have, sir. Thank you very much for coming.
Q. I guess your child is still being treated at Hudson, and you were here today and kind enough to appear, is that correct?
A. Yeah. Thank you. Yes.
MR. McLAUGHLIN: We have no questions, Your Honor. Thank you, Doctor.
THE WITNESS: Thank you.
THE COURT: You may step down. Thank you.
THE WITNESS: Thank you, Your Honor.
(Witness excused).
MR. SMITH: With the Court's permission, we will play the video.
THE COURT: All right. We will take a brief recess, but I want to make sure everything is set on the video before we start.

You may file out. I'll call for you as soon as we are ready.
(Jury out).

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THE COURT: Now, I understood there were still unresolved issues with the video?
MR. SUFFERN: Yes, Your Honor. I think we have two that I'm aware of.
THE COURT: Can somebody give me a copy of the testimony so I can follow it?
MR. SUFFERN: Your Honor, I would refer you to Page 59, Line 14 through Page 60, Line 18.
And the other --
THE COURT: Let me get that one, first.
MR. SUFFERN: Okay. The issue --
(Side-bar conference had off the record).
THE COURT: Now, as I understand the objection of the defendant is Line -- Page 59, Line 14 through Page 60, Line 18 when I gather the -- even though it's not apparent from the transcript, it will be apparent from the video that undescribed ads were being shown to the plaintiff.
When I say "Undescribed," they are not described in the transcript, but one can -- but apparently they were held up to the camera in such a fashion that you can see whose ad it was.

MR. SMITH: Yes, sir. Yes, Your Honor.
THE COURT: All right. Now, you are objecting to that, when he says he's seen the ad before, you are objecting to that for what reason?
MR. SUFFERN: Your Honor, the only purpose for the testimony would be to create an inference that the ads somehow played a role in Mr. Tompkin's decision to smoke the Pall Mall brand.
Mr. Tompkin also testified --
THE COURT: Was he asked about that on cross-examination?
MR. SUFFERN: He was, Your Honor. He was asked on cross-examination whether the fact that his wife smoked Pall Malls played a role in his decision.
THE COURT: No. No. Was he asked about the ad that he identified, as to whether that played a role in his decision to smoke?
MR. SUFFERN: Your Honor, I can't cite a page reference, but I am certain that Mr. Riley, on behalf of the American Tobacco Company, took him through numerous ads and asked him whether he was claiming any reliance upon those ads.
I can't cite a page reference to Your Honor. Mr. Riley's cross-examination starts on Page 91.
THE COURT: You haven't looked at it to find

something?
MR. SUFFERN: Your Honor, I have looked at it, and I can't represent to you -- well, perhaps if we turn to the portion that was excluded regarding -- already by Your Honor, regarding the fact that he relied in part upon Mrs. Tompkin's -- the fact that she smoked Pall Mall, which I believe appears at Page 94 --
THE COURT: You had all night to prepare this, and you can't cite me pages that correspond to your objection?
MR. SUFFERN: I apologize, Your Honor. I was citing the pages -- I only concentrated on citing the pages that I was seeking to have excluded because I thought --
THE COURT: Well, the motion is denied. We

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will play them.
You are going to have to be absolutely prepared on these things. I'm not going to spend all this time when you have had almost an entire day to explain to me what your objections were.
They are denied.
Bring the jury -- I'll go get the jury. Are you ready to go?
MR. SUFFERN: Your Honor, yesterday we asked if we could make a proffer on the issue of Mrs. Tompkin's smoking history.

Could we be permitted to make the record before the jury comes back?
THE COURT: It's in the deposition. You can read it, can't you?
MR. SUFFERN: No, Your Honor. You excluded those portions of the deposition.
THE COURT: I understand, but you can certainly point out to the Court of Appeals where it is in the transcript.
MR. SUFFERN: But the basis for our objection was not that it would introduce ETS as a causation issue into the case.
The basis for our objection was that it gives an incomplete picture of Mr. Tompkin's purported reliance on ads when, in fact, he testified during the deposition that he relied in part upon the fact that Mrs. Tompkin smoked Pall Malls, in forming his decision to smoke Pall Malls.
THE COURT: I thought there was an agreement before the trial that we would not discuss Mrs. Tompkin's smoking history. That's what I was left with very clearly.
You keep changing the game.
MR. SUFFERN: We never agreed to that, Your Honor.
THE COURT: My impression is to the contrary.
Your motion is denied. I want to get on with this trial.
MR. SUFFERN: Thank you, Your Honor.
(Jury in.)

THE COURT: Okay. Let's roll them.
(The video deposition of David Tompkin was played in open court, as follows:)

DIRECT EXAMINATION

BY MR. SMITH:
Q Do you smoke cigarettes David?
A No, not now, sir.
Q Do you smoke anything?
A No, sir.
Q Did you smoke tobacco?
A Yes, I did.
Q Would you tell us the approximate years when you would have regularly smoked tobacco?
A 1950 through 1965.
Q And that would have meant you were how old when you began smoking regularly?
A 1950 I would have been 16 year old.
Q And then you quit in 1965?
A Yes, sir.
Q During the years you smoked, did you believe that

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smoking would cause you a serious health problem?
A No, sir, not really, no.
Q And why do you say that?
A It's -- I don't know, I just don't feel that -- I don't know.

799

DIRECT - TOMPKIN

Q I want to know whether or not during the years you smoked, did you believe it would cause you or could cause you a serious health problem?
A No, sir.
Q Did you inhale when you smoked?
A Yes, sir.
Q Would you tell us the brands that you smoked regularly during the years that you smoked?
A It would have been Old Golds, Philip Morris, Pall Malls, Chesterfield, Herbert Tareyton, Kents and Lark.
Q The first cigarette that you smoked would have been what, when I say smoked I mean smoked regularly?
A It would have been Old Gold.
Q And what, in what years approximately did you smoke Old Gold's?
A 1950 through '51.
Q Did anyone else in your family smoke Old Golds?
A Yes, sir.
Q Who was that?
A My older brother.
Q And his name?
A Gilbert.
Q And when you say your older brother, how much older than you is he?
A He's five years.

800

DIRECT - TOMPKIN

Q So you indicated you started when you were 16 and he would have been 21 at that time?
A Yes, sir.
Q Approximately how many cigarettes a day were you averaging during this period of 1950 and into 1951 when you smoked the Old Golds?
A Approximately 4 to 6.
Q Did you change to another cigarette regularly as a regular smoker at that time when you quit Old Golds?
A Yes, I did.
Q And what cigarette was that?
A Philip Morris.
Q And during what years, approximate years did you smoke Philip Morris, Dave?
A 1951 through approximately '54.
Q And how many cigarettes were you smoking a day on an average during that period, your best estimate?
A Approximately 4 to 6.
Q And when we get into 1954, you are smoking Philip Morris, did you switch to another brand?
A Yes, sir.
Q And what brand was that, please?
A It was Pall Malls.
Q And approximately how long or approximately what years did you smoke Pall Malls?

801

DIRECT - TOMPKIN

A '54 through '57.
Q And approximately how many cigarettes were you

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averaging per day during that period?
A Six to eight.
Q Now in 1957, Dave, did you switch to another cigarette?
A 1957? Yes.
Q And what was that?
A '57 it would have been Chesterfields.
Q And would you tell us the years approximately that you smoked Chesterfield, please?
A Until approximately 1959.
Q And during the period then from 1957 through or into 1959 when you smoked Chesterfields, would you tell us approximately how many cigarettes per day you were averaging?
A Probably ten, somewhere in there.
Q In 1959 did you change to another cigarette?
A Yes, 1959 I was Chesterfields.
Q Yes, you were smoking Chesterfields. Did you change to another cigarette at that time?
A 1959. Yes, I did.
Q And what cigarette was that?
A That was her Herbert Tareyton.
Q And would you tell us the approximate years that you

smoked Herbert Tareyton?
A About 1961.
Q That would be from when to when then?
A '59 to '61.
Q And approximately how many Herbert Tareytons, or how many cigarettes were you smoking on an average during that '59 to '61 period, as best you recollect?
A One and a half packs.
Q Can you tell us why you switched to Herbert Tareyton?
A Yes.
Q And why was that?
A Because of the filter.
Q What do you mean a filter?
A Well, the charcoal filter that I remember.
Q When you say charcoal filter, what cigarette had the charcoal filter?
A It was Herbert Tareyton.
Q How did you learn of Herbert Tareyton having this charcoal filter when you made the switch?
A Through advertising.
Q And that would have been advertising by whom or by what cigarette company?
A Herbert Tareyton.
Q In 1961, when you quit smoking Herbert Tareyton regularly, did you go to another cigarette?

A Yes.
Q And what cigarette was that?
A Kent.
Q Would you tell us the approximate years that you smoked Kent, Dave?
A '61 through '64.
Q And during this period of '61 to '64, can you tell us approximately how many cigarettes a day you are smoking then?
A '61 through '64? Probably two to three.
Q When you say two to three, you mean two to three what?

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A Packs.
Q And that's an average per day?
A Well, if you have to average I would say maybe 2 to 2 and a half, some days you might hit 3.
Q You say your average would be 2 to 2 and a half but your high days would be 3 packs?
A Yes, sir.
Q Would you tell us why it was in 1961 you switched from Herbert Tareyton to Kent?
A It would be the filter, micronite filter.
Q On what cigarette?
A Kents.
Q And how did you learn that Kent cigarettes had a micronite filter?

A Through advertising.
Q And this would have been advertising of what cigarette company?
A It was Kents.
Q In 1964 was the end of the period that you smoked Kent regularly, as best you remember?
A Yes.
Q What cigarette did you go to then, Dave?
A Larks.
Q What period of time did you smoke Larks?
A '61 through '65.
Q During that period of time, would you tell us how many cigarettes a day you are smoking, the range?
A It would be probably about the same as I did with the Kents.
Q And for the record, if you would state that?
A Okay. It would be 2 to 2 and a half to 3 max.
Q Average 2, 2 and a half, max 3?
A That's correct.
Q Same as Kent?
A Right.
Q Why was it that you switched to Lark?
A That would have been the filter also.
Q What do you mean the filter? What about their filter?
A It had a charcoal filter, and I believe it had said it

had outer filters and inner filters. That was the phrase, if I recall.
Q And that's why you switched to that?
A Yes, sir.
Q Where did you learn about these filters?
A Through advertising.
Q And this would have been the advertising of what cigarette company?
A It would have been Lark's.
Q And I guess for purposes of the record, make sure the record is clear, what was there about these ads that you saw that you have indicated caused you to be aware of filters and you switched to their cigarettes, what was it about these ads of these three companies, Herbert Tareyton, Kent and Lark that caused you to think that you wanted to smoke their cigarette with their filters, if anything?
A I would say safety.
Q Dave, when did you quit smoking again, please?
A 1965.
Q Tell us the circumstances of your quitting?

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A Well, I knew it was affecting my breathing.
Q What do you mean by that?
A Well I would have to exert, exert extra on your body, put more pressure on your body, do more physical activity. I felt I just didn't have the lung capacity there.

Q When did you start becoming aware of that, approximately?
A Probably two to three years before.
Q Before you quit?
A Yes.
Q Tell us the circumstances of your quitting, where you were, and what you did?
A Well, we were working on a building.
Q Where at?
A In Akron, Ohio. It's called Stan Hewitt.
Q What is Stan Hewitt?
A That's a home that was built by the Sieberling family. And after, I imagine after each one of them died off, they wanted to turn it over to the city or something, so it wouldn't be tore down, so they wanted it preserved. So they started an association to rehabilitate it and have tours through there.
Q And this was a period, this was after that association was started, as you understand it, when you were there working?
A I'm sorry I interrupted you.
Q Yeah.
A I'm not sure about the association, whether it was in force before I worked, afterwards, there was, I'm not familiar with that.

Q But your company went out there to do work on the brick of that building?
A Yes, sir.
Q Had anyone else in your family ever worked on that building?
A Yes.
Q And who would that have been?
A My grandfather.
Q The type of work that you were doing on that building at the time you were there would have been what, David?
A It is called tuck pointing.
Q What does that mean?
A Cutting out the loose mortar and any cracks or holes in the mortar and replacing it with mortar sealing them off.
Q And what was the weather like on the day that you decided to quit?
A I remember it was cool, because I had a flannel shirt on, I remember that.
Q Did you have a jacket on?
A Not that I recall.
Q But you had a flannel shirt?
A Yes, sir.
Q And by that, what season do you think you were in at that time, as best you remember?
A It would have been either the spring or the fall.

Q Tell us the circumstances of your quitting, whether anything was said or just what happened?

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A Well, I was with a friend of mine.
Q Who was that?
A Roll Walters, he works with us. Or worked with that company.
Q You were both working together on the job?
A That's correct.
Q You were a bricklayer?
A Correct.
Q And his title on that job was what?
A Laborer.
Q All right. Go ahead, please.
A And we were standing there in the morning and I told him that I decided I was going to quit, or I wasn't -- if I quit I quit, if I didn't I didn't. And so he said that sounded like a good idea and he decided he was going to quit also.
Q What did you do then?
A I just quit.
Q And have you ever smoked again?
A No, sir.
Q Had you ever tried to quit before this day in 1965?
A Yes, I had.
Q On very many occasions?

A Probably a couple times that I recall.
Q And would those efforts successful?
A No, sir.
Q But the one in '65 was?
A Yes, sir.
Q Dave, have you ever drank alcoholic beverages in your life?
A Yes, sir.
Q Was there ever a period of time that, in your opinion, you were drinking too much alcohol?
A Yes, sir.
Q What did you do about that?
A I quit.
Q And when was it that you quit, approximately?
A '89.
Q Also for the record, did you ever have anyone in your family, to the best of your knowledge, who has died of lung cancer?
A No, sir.
Q Have you had, as best to your knowledge, people who have died of cancer?
A Yes.
Q But no lung cancers, to the best of your knowledge?
A That's right.
Q Dave, I would like to go back, go through your working

history a little bit, please.
Now, you graduated from high school in what year?
A 1952.
Q Did you work prior to graduating from high school?
A Yes.
Q And would you tell us about that?
A How far back?
Q Back to when you remember working as a kid?
A I used to mow lawns here when I was very young. I was a paper boy. I worked in three, three gas stations.

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Q What did you do in the gas stations?
A One I washed cars. Two of them I pumped gas in; and one of them I pumped the gas and changed the oil.
Q Okay. And are you in high school in this period we are talking about?
A Yes, sir.
Q Okay. Any other jobs that you can think of that you had before you graduated from high school?
A Falls Theater.
Q What did you do there?
A I was an usher and I worked in a popcorn room. And I worked in a parking lot.
Q For the theater?
A Yes, sir.

Q Does that cover most of your jobs before you graduate from high school?
A No, sir.
Q Okay.
A I worked at Old Trail School.
Q What did you do there?
A Mowed the grass, cleaned the rooms. And that's about it.
Q Then you graduated in 1952?
A Right.
Q What did you then do, sir?
A I believe I was still working in the one gas station, and I know I went to work at Stalwart Rubber, but I think that was later on. Let's see that would have been -- yes, I went to work at Stalwart Rubber after the gas station.
Q And where -- how long were you at Stalwart Rubber, approximately?
A About nine months.
Q Then what did you do?
A I started my bricklayer apprenticeship.
Q Approximately what year are we in?
A 1953.
Q This would have been before you and Jocelyn were married?
A Yes, sir.

Q And how long did your apprenticeship last?
A Until 1957.
Q So it was a four year apprenticeship?
A Yes, sir.
Q What is a bricklayer apprenticeship?
A Well, it's just where you are indentured to a company and it is their obligation to teach you the trade, and then you have to go to school at night for four years.
Q Regarding bricklaying?
A Yes, sir.
Q Were did you go to school at?
A Howard Trade Vocational.
Q That's in what city?
A Akron, Ohio.
Q And in 1957, were you successful in completing your apprenticeship?
A Yes, sir.
Q What happened then, as far as -- what was your job title?
A Brick mason, bricklayer.

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Q And what are the advantages of being a brick mason or bricklayer over being an apprentice?
A Well, you can go anywhere you want to.
Q Does it pay better?
A Definitely.

Q Okay. From 1957 forward, have you been in the bricklaying field since that time?
A Yes, sir.
Q Tell us briefly of your employers coming forward, if you would, please?
A My apprenticeship was with John Jacobson, Akron, Ohio, Frank Brown and Son, Joe Livigni. And I went into business for myself and Joe -- Joe Livigni.
Q You and Joe Livigni went into business together?
A Yes, sir.
Q This was what year, approximately?
A It would have been 10 years ago, it would have been '84.
Q And have you gentlemen been in business ever since?
A Yes, sir.
Q And the name of your company?
A D and J Masonry, Incorporated.
Q And you folks own the stock in that company?
A Yes.
Q The records of your earnings that you've made as far ass your work is concerned are contained in a Social Security printout that you obtained, is that correct?
A Yes.
Q I'm going to hand you what has been marked Plaintiff's Exhibit Tompkin 35.

Would you tell us what that is, please, sir?
A That's a where you send into the federal government, the Social Security office, and I'll send you back a record of your earnings.
Q Is that a record of your earnings?
A Yes, sir.
Q And that covers what years?
A Well, it starts at 37 through 50 down through '93.
Q Does it include '93 or is that a blank?
A It's just a -- or no this one here is '92 and '93, I beg your pardon. I'm looking over in the wrong column.
Q The year that one is is what?
A '93, but it's partial.
Q Now, the first page of this exhibit is the cover sheet, is that correct?
A Right.
Q And then the second page, which we'll mark as actually Exhibit 35 dash 2. That is the sheet that shows your specific earnings, is that correct?
A Right.
Q Dave, I would like you to look at that, please, and the high or the highest amount you see on that is what, how many dollars?
A Okay. My taxed earnings?
Q Yes.

A The highest amount would be $32,416.
Q That would be in what year?

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A 1990.
Q And the lowest amount on there would be what?
A 1951.
Q And that's how many dollars?
A $290.
Q Better to lay brick than work in a gas station?
A Definitely.
Q Dave, in 1992, your earnings were how much, sir?
A 1992?
Q Yes?
A $13,972.
Q Was that a year that you worked a full year or not?
A No, sir.
Q Was that the year that you were diagnosed as having lung cancer?
A Yes, sir.
Q Did that seriously impact your earnings in that year?
A Yes, sir.
Q We'll come back to that.
I'm going to hand you what has been marked Plaintiff's Exhibit Tompkin 36. Can you tell us what that is, please?
A That's my tax return for 1993.

Q And that shows that you earned how much in 1993?
A $25,661. My actual -- that is with interest and so forth.
Q How much does it show that you earned from your occupation?
A Wages is $21,275.
Q And again, was that impacted, your earnings from your occupation, was that impacted by your lung cancer?
A Yes, sir.
Q How long did you expect to continue to work, Dave, if you had the ability to do so?
A The longest I expected to work?
Q Yes, sir?
A 65.
Q If you, and for that matter if your health permits you to continue to do that, is it still your intention to work to age 65?
A Yes.
Q Based upon your education and your experience in the field of being a bricklayer since back, I guess, starting as an apprentice 41 years ago, and your desire insofar as working, continuing the work is concerned, how much did you intend to earn per year and expect to earn per year in the years from now up until age 65?
A 25 to 30,000.

Q Is that your opinion?
A That's my opinion.
Q And is that opinion as to what you think you would have earned, is that the probable amount? Can you tell us what that's based on? The probabilities of what you would have earned?
A The probability for me to earn that money is there, yes, with my talent and my physical, if I had good physical ability, yes.
Q That is your opinion?
A That is my opinion, yes.

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Q I'm going to hand you for identification Plaintiff's Exhibits Tompkin 18, 19, 20, 21, 22, 23, 24, 25, and 26.
Would you look at those, please, Mr. Tompkin and tell us what they are?
A They are ads for cigarettes, yes.
Q And take a quick look through each of those sheets. I know you can see the top one?
A Yes, sir.
Q Do those ads fairly and substantially represent the ads that you saw and you've referred to that you saw earlier regarding Kent cigarettes?
A Yes.
Q Would you tell us first of all, what is Tompkin 25, to make sure our foundation is clear? Is that 25 or 26, the

number you will see in the corner the yellow sticker?
A I see 18.
Q 18, forgive me.
A 19, 20.
Q Go to 18, Dave, that's okay?
A 18?
Q Yeah. And can you tell us what that ad is, in essence?
A That's an ad advertising the filter, filter on their cigarette.
Q What cigarette is that?
A Kent.
Q And what type of filter is that?
A It's a micronite filter.
Q Let's go back to -- that's Tompkin 18, is that correct?
A Yes.
Q And can you tell us whether or not you have seen that ad?
A Yes, I have seen that ad.
Q And can you tell us when you have seen that ad?
A It was either when I was smoking or during the time frame. It was when I was smoking I saw it.
Q Would that have, that particular ad or an ad substantially like it, would you have seen, with respect to

the micronite filter language, would you have seen that ad before you began smoking Kents or after?
A Before.
Q You testified to that earlier, is that correct?
A Yes.
Q Would you hold that ad up for us, please?
(The witness did as instructed.)
Q I would like to go to the next exhibit. This is Tompkin 19?
A Yes, sir.
Q Would you tell us what that is, please?
A Yes, that's another ad for Kent cigarettes advertising the micronite filter.
Q And again, when would you have seen that ad with respect to the portion advertising the micronite filter?
A During the period I was smoking.
Q With respect to your smoking Kent, would you have seen that ad before or after you smoked Kent?
A It was before.
Q Go to the next exhibit, please.

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What is that exhibit?
A This is 20.
Q And what is that?
A That's another ad for Kent cigarettes.
Q And does that also talk about the micronite filter?

A Yes, sir.
Q Can you tell us whether or not that ad, that picture fairly and accurately represents advertisements that you saw with respect to Kent before you began smoking Kents?
A Yes, sir.
Q And what is that ad, sir, does it or does it not?
A It was before.
Q And does it fairly and accurately represent what you saw before?
A Yes.
Q The next exhibit.
What was that?
A 21.
Q Would you tell us what that is, please?
A That is another advertisement for Kent cigarettes.
Q Does, can you tell us when you saw that particular ad, substantially similar ad?
A It was when I was smoking.
Q You have seen them?
A Yes, sir.
Q The lead language in that particular exhibit says what? Bold language at the top?
A "Here is how science solved your problem of sensitive to nicotine and tars with a great new cigarette, Kent."
Q And then it goes on in the body to talk about the

micronite filter moes it?
A Underneath Kent I presume it does in the fine print, it's hard tore for me to read with this copy, but here in the bolder print it is micronite filter exclusive.
Q What's the language regarding that?
A It says Kent with exclusive micronite filter.
Q And again, could you tell us when you saw that particular ad with respect to the time period you were smoking Kents?
A It was before I smoked Kents.
Q The next exhibit is Exhibit Number what?
A 22.
Q And what is that, please, sir?
A This is another ad for the filter of Kent cigarettes.
Q And by the filter of Kent cigarettes we are talking about what filter?
A Micronite.
Q And can you tell us again whether or not you saw that particular ad?
A Yes, I did.
Q And can you tell us again for the record when you saw that particular ad with respect to your smoking of Kent cigarettes?
A It was before.
Q The language up at the top of that ad says what?

A "Why do these stains mean so much to one out of every three smokers?"

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Q Okay. If you could face that back to us again.
Thank you, sir. Would you go to the next exhibit, please?
A Exhibit 23.
Q And would you tell us what that is?
A That's ab ad for Kent cigarettes and the micronite filter.
Q Can you tell us whether or not you saw that ad -- you've seen that add before?
A Yes, I had.
Q And when was that?
A That was before I started smoking Kents.
Q Would you read the top portion of that particular ad to us?
A "The American Medical Association voluntarily conducted in their own laboratory a series of independent test of filters and filter cigarettes as reported in the Journal of American Medical Association. These tests proved of all the filtered cigarettes tested, one type was the most effective for removing tars and nicotine. This type filter is used by Kent and only Kent."
Q Would you put that back again to us for a moment, please?

A Thank you.
Q Show us the next exhibit, please. Or if you would look at the next one yourself. That's Exhibit Number what, that you have in your hand?
A 24.
Q And can you tell us whether or not you've ever seen that exhibit before?
A Yes, I have.
Q And when was that?
A That was before I was smoking Kents.
Q And would you show that to us, please.
Can you hold it so that we can have it on camera while you are reading it at the same time, please? Maybe your wife will help you hold it back there?
A I can read it this way.
Q So the camera can get it while you are reading, okay?
A Okay.
Q What does it say at the top?
A "The difference in price is just a few pennies, the difference in protection is priceless."
Q Thank you. Thank you.
Would you look at the next ad, please? That's Exhibit Number what that you are holding?
A 25.
Q Would you tell us whether or not you've ever seen that

ad before?
A Yes, I have.
Q And when was that, please?
A That was before I was smoking Kents.
Q And would you turn that to us a minute, please?
And what are the three key words on that ad in the boldest print?
A "Kent filters best."
Q Can you tell us whether or not it references the micronite filter?
A Yes, it says micronite filter.

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Q Your next exhibit that you have over there is what?
A 26.
Q And would you tell us whether or not you've ever seen that particular ad before?
A Yes.
Q And that would have been when?
A When I was smoking Kents.
Q And would you tell us, or would you show it to us, please?
And if you can read us the key words, but do it in a way that we can see it at the same time, please?
A "Treat your taste kindly with Kent."
Q Thank you.
I'm going to now hand you what has been marked

as Plaintiff's Exhibits 15, 16 and 17.
With respect to Plaintiff's Exhibit 15, would you tell us what that is, please?
A That's an ad for Herbert Tareyton cigarettes.
Q Have you ever seen that ad before?
A Yes, I have.
Q And when was that?
A This was before I smoked Herbert Tareytons.
Q Would you show that ad to us for a minute?
The -- there is a distinctive -- is there a distinctive feature about that ad that you recall?
A The little guy in the hat.
Q Was that their logo?
A I don't know if it's the logo, but he was present in their advertising.
Q When you say present, was he present in all of it or some of it?
A Just some of the ads that I recall.
Q Would you show us -- would you look at the next exhibit rather, please?
And that is exhibit number what, Dave?
A 16.
Q And have you ever seen that ad before?
A Yes, sir.
Q And when was that?

A That was -- I believe this one was while I was smoking Herbert Tareytons.
Q Okay.
A No, this was after.
Q That ad?
A Let's see -- this is while I was smoking Herbert Tareytons.
Q Does it reference a filter?
A Yes, sir.
Q And what does it, what does it say about its filter?
A It says it's a dual filter.
Q And would you show that to us, please?
A Yes.
Q The -- what does it say at the top of that ad?
A "Dual filter gives you what no single filter can."
Q And then underneath there what does it say, underneath the picture?
A "The real thing in mildness, the real thing in fine tobacco taste."
Q Would you look at the next exhibit, please.

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This is Exhibit Number what, Dave?
A Yes, sir.
Q Pardon?
A Beg your pardon?
Q The number of the exhibit?

A 17.
Q And what is that?
A It's an advertisement for Herbert Tareyton cigarettes.
Q Have you ever seen that ad before?
A Yes.
Q And when was that?
A This would have been while I was smoking Tareytons.
Q And does it say anything about the filter?
A That's the dual filter, charcoal.
Q Even has a picture of it's there, is that what you are referring to?
A Yes.
Q The -- can you tell us -- I guess you've discussed with us the fact of you are seeing ads regarding this dual filter before, is that correct?
A Yes.
Q You did talk about that earlier today, is that true?
A Yes.
Q And can you tell us whether or not you saw some of those ads regarding that dual filter before you began smoking Herbert Tareytons?
A Yes, sir.
Q And yes sir, meaning what?
A I could have seen those before I started smoking Herbert Tareytons.

Q I'm not talking about that particular language. I want to go back why did you start smoking Herbert Tareytons?
A Because of the filter.
Q And what is there about that Herbert Tareytons filter?
A The charcoal.
Q And when did you learn about that charcoal filter?
A When I saw these ads.
Q And in relationship to your smoking Herbert Tareytons when did you learn about the charcoal filter?
A It may have been before I started --
Q Pardon?
A Before I started smoking them.
Q I'm going to hand you what has been marked as Plaintiff's Exhibit 27 and 28.
Would you tell us what Plaintiff's Exhibit 27 is, sir?
A That's an advertisement for Lark cigarettes.
Q And have you ever seen that ad before?
A Yes, sir.
Q And when was that?
A This one was before I started smoking them.
Q Smoking what, anything?
A Larks.
Q Would you show it to us, please.
What does the bold print say on that ad?

A It says, "taste the good things."
Q Can you do it so both you can see it and the camera

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could see it and the jury can see it, Dave?
Go ahead?
A "Taste the good things that happen to smoke filtered through Lark's charcoal granules."
Q And what does it show at the top of that? What is that?
A It shows the filter being cut apart with charcoal falling, the charcoal is coming out.
Q Okay. If you go to the next exhibit, please. And this is Exhibit Number what?
A 28.
Q And have you ever seen that exhibit before?
A Yes, sir.
Q And when was that?
A This was -- it was either during the time I was smoking or before I started smoking them.
Q And would you show that to us, please.
And again, what does it say in bold print?
A "Now taste the good things that happen to smoke filtered through charcoal granules."
Q And again, does it show the picture of the charcoal coming out of the filter?
A Yes.

Q Would you go to the next ad, please?
A This is 32 -- or 33, I beg your pardon.
Q And let me take that. Have you seen Exhibit 33 before?
A Yes.
Q Did you ever smoke L&M, very many of them?
A Not that I recall.
MR. COFER: Objection.
BY MR. SMITH:
Q And same way with Exhibit 34, is that an L&M?
A Yes, sir.
Q Have you seen that ad also?
A Yes, sir.
Q On Exhibits 33 and 34, can you tell us whether or not you saw them during the period of time you smoked?
A No, sir.
Q You just know you have seen it?
A I've seen it.
Q I'm going to hand you what have been marked as Plaintiff's Exhibit 2 through 6.
Would you tell us what Exhibit 2 is, please -- or withdraw that.
Have you ever seen Exhibit 2 before?
A Yes.
Q And when would you have seen that?

A I'm not sure.
Q Can you tell us when you would have seen it in relationship to your smoking? Whether or not you saw it before or after you quit smoking?
A This would be before.
Q Before you quit?
A Yes.
Q But you can't say when?
A No.
Q Would you show us that ad, please?
This is of what company?

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A Old Gold.
Q And what is the, what do the key words say at the top upper left hand corner there?
A "The crowning treat in smoking pleasure, now King size."
Q Those are the largest words on that ad, are they not?
A Yes, sir.
Q Would you go to the next exhibit, please. This is Exhibit Number what?
A Three.
Q Have you ever seen that exhibit before?
A Yes, sir.
Q And when would you have seen that, please?
A I'm not sure.

Q Can you give us a relationship to when you were smoking; whether you saw it before, after or don't know?
A I don't know.
Q If you would go to the next exhibit, please.
That's Exhibit Number what?
A Number 4.
Q Have you ever seen that particular ad before?
A Yes, sir.
Q Can you tell us whether or not you saw that ad either before or after you smoked? Do you know?
A No, sir.
Q The next exhibit.
That is Exhibit Number what?
A Number 5.
Q Have you ever seen that ad before?
A Yes, sir.
Q Can you tell us when you saw that ad, either before you quit smoking in 1965 or after, or you don't know?
A I don't know.
Q The next exhibit?
A Exhibit 6.
Q Have you ever seen that particular ad before?
A Yes, sir.
Q And do you know when you saw that ad?
A No, sir.

Q And you can't tell us again if that was before or after you quit smoking?
A No, sir.
Q I'm going to hand you what has been marked Plaintiff's Exhibit 7, Tompkin 7.
For the record, all the exhibit numbers we are using have the name Tompkin on them as well as the number.
Have you ever seen that particular ad before?
A Yes, sir.
Q And can you tell us when you saw it?
A No, sir.
Q I'm going to hand you Plaintiff's Exhibits 8, 9, 10 and 11.
Plaintiff's Exhibit 8, have you ever seen that before?
A Yes, sir.
Q And can you tell us when?
A No, sir, I cannot.
Q On this series of -- withdraw that.
You can't tell us when you saw that particular

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ad?
A No, sir.
Q Let's go to the next one, please.
That's Plaintiff's Exhibit what?
A Nine.

Q Have you seen that ad before?
A Yes, sir.
Q Can you tell us when it was in relationship to when you were a smoker?
A I cannot.
Q Would you look at the next one.
Have you ever seen that ad before?
A Yes, sir.
Q Can you tell us when you saw it?
A No, sir.
Q Would you look at the next exhibit, please.
Have you ever seen that one before?
A Yes, sir.
Q Can you tell us when?
A No, sir.
Q I'm going to hand you Plaintiff's Exhibits 12 through 14.
Plaintiff's Exhibit 12, have you ever seen that before?
A Yes, sir.
Q And can you tell us when?
A No, sir.
Q Plaintiff's Exhibit 13, have you ever seen that before?
A Yes, sir.

Q Can you tell us when?
A No, sir.
Q And Plaintiff's Exhibit 14. Have you ever seen that before?
A Yes, sir.
Q Can you tell us when?
A No, sir.
Q I want to ask you the question, while you smoked Old Golds or before you smoked Old Golds, can you tell us whether or not you ever saw any ads regarding Old Golds?
A Before I started smoking Old Golds?
Q Before or while you start smoking them?
A I can't remember.
Q How about Philip Morris? Did you ever see any ads before or while you smoked?
A I had to have seen them, yes.
Q Is your answer you did?
A I would say yes.
Q Why do you say that?
A Because of the magazines I read and different advertisements I saw, it would have to be available.
Q What magazines were you reading?
A Life. Basically Life.
Q Why did you like Life?
A Because of the pictures that was in it.

Q What ages were you when you read Life a lot?
A Oh, I would have to go back to maybe 8 year old.

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Q Up until what age?
A Well, probably 17, 18, 19.
Q Was Life available in your home?
A Yes.
Q How is that?
A Well, my older brother, my two older brothers belonged to the Scouts, I was in the Scouts and we used to collect papers and magazines for the war drive. Used to store them, separate them, put them in our basement, put them in the garage so I had access to all magazines that were available at that time.
Q How often did Life come out, do you recall?
A I was thinking weekly, but I'm not sure.
Q That's your best recollection?
A That's my best recollection, yes.
Q And say it came out 52 times a year, of those how many were you looking at, as best you recall?
A During the war?
Q Okay. During the war?
A And after the war, I would say anytime we picked magazines out on a drive, I looked at every one of them. And I would -- probably the majority of them.
Q When you say you looked at them, what do you mean by

looking at them?
A Well, looked at the pictures.
Q Would you go through the whole magazine or just a little bit of it?
A I would go through most of it. I would look at the pictures because a lot of it was during the war, for tanks, fighting, airplanes. And then there was - If there was any movie stars in there I looked at them.
Q Dave, we have some photographs here that I would like you to explain to the ladies and gentlemen of the jury, please.
First I'm going to hand you Plaintiff's Exhibit 53.
Would you tell us what that is, please?
A That's a picture of my family.
Q Okay. And tell us who they are as we go through it, if you would?
A This is my son-in-law, he's married to Deb my oldest daughter, that's myself, that's my wife, my youngest daughter Donna, Denise the middle daughter and her husband Doug.
Q This was taken approximately when? Just give me a range you are comfortable with, I don't care about being absolutely precise?
A Oh, it had to be '91 or '90, somewhere in there.

Q Plaintiff's Exhibit Tompkin 52, is what?
A That's my youngest granddaughter, that's her birthday. This is her mother, Debra, that's Sarah, and Donna and that's my wife here in the background.
Q That was taken approximately when?
A I was afraid you were going to ask me that.
Q Would that have been in the '80's or '90's?
A She was, let's see, probably about 8, I would say that was in the '90's, yes.
Q Plaintiff's Exhibit Tompkin 54, what is that, please?
A That's my birthday.

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Q Do you recall the approximate year?
A That would be in -- no, sir, I don't. That's also in the '90's.
Q It's in the '90's?
A Yes, sir.
Q Who is in that picture?
A This is my father in the background, that's my father, this is my son-in-law, that's Sarah, this is Christine to the back of you, and the head chopped off is my son-in-law Doug, and my daughter Denise.
Q Tompkin 37, what is that, sir?
A This is a picture of my brothers and my father on his 90th birthday.
Q You have three brothers in there with you?

A Three brothers and one is missing, Gilbert, he's in California.
Q How many brothers did you have?
A Four.
Q Do you have any sisters?
A No, sir.
Q Are all your brothers alive?
A Yes, sir.
Q So there are five boys?
A Right.
Q Where do you stand age-wise, in the middle, one end or the other?
A Middle.
Q So you are the third?
A Correct.
Q Your father still alive?
A Yes, sir.
Q How old is your dad?
A He'll be 92, I believe, yeah, 92 in November. This year.
Q Plaintiff's Exhibit Tompkin 38, Dave, what's that, sir?
A That's a chest I made for my youngest daughter.
Q Approximately when did you make that or when was this taken?

A Approximately in late '80', early '90's.
Q Tompkin 39, what is that, sir?
A That's a picture of myself at King's island.
Q When was that?
A It would have been in the '80'.
Q Who is this guy, Tompkin 40?
A That's me.
Q When was that?
A That would have to be in the '50s.
Q What, when you say in the '50's, approximately, can you tell us approximately when in the '50's?
A It would be between '53 and '57.
Q Tompkin 41, what's that?
A That's a picture of me in Florida.
Q When was that.
Approximately, again?
A That would have been in the late '80's.
Q Tompkin 42, what's this?
A That's a picture of me also in Florida, fishing.
Q When would that have been?

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A That would have been in early '92.
Q This is before you were diagnosed?
A Yes, sir.
Q Plaintiff's Exhibit 43, what's that, Dave?
A That's also a picture of me in Florida fishing.

Q Is this the same period as 42?
A No, sir.
Q When would this have been?
A It would have been in 93'.
Q Your family -- withdraw that.
Did you like to fish a lot?
A Yes, sir.
Q Do you still like the fish?
A Yes, sir.
Q How about your wife?
A I just got her started this year.
Q Any other members of your family fish?
A Yes, all of them.
Q Tompkin 44, what's that?
A That's a picture of me in Florida in the swimming pool.
Q When would that have been?
A That would have had to have been in January, February, '92.
Q Just a few months before you were diagnosed again?
A Yes.
Q Tompkin 45, tell us about that picture?
A That's a picture of me with my oldest daughter. And that would have probably been somewhere around '59.
Q You still have a crew cut at that time, is that right?

A Yes, sir, excuse me. That would be about '58, '59.
Q Tompkin 46, what is that, sir?
A That's a picture of my backyard. That's a fence I put down in the back and brick work I did in here.
Q Approximately when was this taken?
A Three or four years ago.
Q Is this the home you still live in, sir?
A Yes.
Q Tompkin 47, would you tell us what that is, please?
A That's a picture of my front, front of my house. That's the sidewalk I put in here, and I don't remember when I built that, but I put this sidewalk in and I brick veneered the front of the house. That would have to be some time in the late '60's or early '70's.
Q Do you still live in this home?
A Yes, sir.
Q Here is a tough guy here, Tompkin 48, who is that, please?
A That's a picture of me.
Q How old were you?
A 16.
Q Do you know where that was taken or not?
A No, sir, I don't know.
Q Tompkin 49. Who is that, please?
A That's a picture of me putting that brick sidewalk in

that was earlier in the pictures before it's finished.
Q That would have been again in approximately what

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period of time?
A That was probably in the '80's.
Q Tompkin 50. What is that?
A That's a picture of a house my wife and I bought in southern Ohio.
Q And what's -- withdraw that.
Approximately when was this picture taken? What time period, roughly?
A '68, '69.
Q And do you still own that home?
A No, sir.
Q And the significance of this picture is what?
A It's what it looked like before we purchased it.
Q Did you do some work on it?
A Yes, sir.
Q Tompkin 51 is what?
A That's a picture of the front porch and the deck I put on and siding and new windows.
Q And that's, I take it that's the after picture of 50, is that correct?
A Right.
Q Dave, was it your hope to -- or let me restate that, please, I'll withdraw that.

You indicated you wanted to work until you were 65?
A Yes, sir.
Q And in addition to laying brick until you were 65 you going to do anything else?
A Yes.
Q What was that?
A I was going to purchase homes in the better neighbors that were in need of repair, and I was going to repair them and I would sell them.
Q This was a goal that you had, that you wanted to do, is that correct?
A Yes, sir.
Q And how did you plan on doing that and brick work and achieve also your goal of earning 25 to 30,000 a year? How were you going to do that?
A Supplement my income with laying brick.
Q Are you capable of doing other things with homes besides brick, as shown in 51? Did you do that work that's shown there?
A Yes, sir.
Q Are there any parts of work in building or remodeling a house that you can't do?
A I tried -- I do not do electrical work, I stay away from it because that's a different field.

Q Other than electrical work can you do everything else?
A Yes, sir.
Q Tompkin 55, what's that, sir?
A That's Easter. That's my youngest daughter Sarah.
Q Is she in the red jacket?
A Yes, there.
This is her husband Mitch and my daughter Debra.
Q This is approximately what time zone?
A It's probably in the late '80's.
Q Tompkin 62 is what, sir?
A That's a family picture of part -- my new son-in-law's

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family and our family.
Q Your father in that picture?
A Yes, sir. He's down in the lower corner.
Q Over here?
A Yes, sir.
Q This was taken approximately when?
A Let's see, they've been married I think a year, it would be '93.
Q Here is a little picture, Tompkin 63.
A Yes. That was at my niece's wedding in Chicago. That's my father and myself and my wife in-between.
Q Your wife is right behind your dad?
A Yes.
Q This was in approximately when?

A It had to be in '92, '93 -- 93'.
Q That was after you were diagnosed?
A Yes.
Q Tompkin 56 is what?
A That's a picture of me sitting on a patio in a condo we rented in Florida.
Q What time period are we in?
A We'd be in '93.
Q Tompkin 57?
A Yes, that's a picture of my daughter and I on a boat. Well, it's a ship, I should say. And it was a cruise we were going to take.
Q Incidentally, is your wife, is she --
A She was the one that took the picture.
Q These here, she's the one that picked these pictures also. Did she have a hand in picking these pictures we have here out of your albums?
A Yes, sir.
Q This would have been taken approximately when?
A That was in January of this year.
Q You are continuing to live life to its fullest to the best of your ability, is that correct, sir?
A Yes, sir.
Q Tompkin 58 is what, sir?
A That's my 50th birthday.

Q That's you cutting the cake?
A Yes, sir.
Q Tompkin 59?
A Yes, that's me in the center, my youngest daughter here, this is Denise, and these two are my nephews here.
Q That's taken about when?
A Oh, it would have to be '60's, I'm not sure, '60's, '70's.
Q '60's are or '70's?
A I'm not sure, somewhere in there.
Q Tompkin 60, what is that, please?
A That's a picture of my brother Bruce and myself coming in after fishing for the morning or afternoon.
Q Where were you?
A In Canada.
Q Whereabouts did you go?
A That was Tweed.
Q Where is that?
A That's northeast of Toronto.
Q Were any other family members there?

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A Yes.
Q Who were they?
A There was my brother Gary, my brother Bill and my father and I believe my brother Gill.
Q So all boys?

A I'm pretty ti sure all of us and dad were there at that time.
Q And Tompkin 61?
A Yes.
Q Who is that, please?
A That's my wife and my oldest daughter Deb and myself.
Q Taken approximately when?
A Well, she was born in '57, so some time after '57.
Q When you say some time after '57, she's still pretty small I guess so are we talking in the '50's?
A Yes.
Q Dave, how would you describe your family?
A Excellent.
Q The frequency with which you or -- well, with which you I guess have contact of one of your members of your family would be approximately what?
A Well, Deb, she lives in Stow, probably see her on the average of maybe once a week or so. Donna, we -- she lives, her and her husband live in Norwalk so we try to get up there at least once a month. And Denise, they live in Marion, Ohio, and we try to see them at least 4 times, five times a year. But we keep in constant touch on the phone every week.
Q How about your dad? Do you see your dad very often?
A Yes, sir.

Q Dad still live in this area?
A Yes, sir.
Q Dad's not feeling super good himself right now, I take it?
A No, sir.
Q His problem is what, Dave?
A Cancer.
Q Do you know what type of cancer he has?
A To my knowledge, I believe it's a glandular cancer.
Q Have you been trying to help care for your dad?
A Yes, sir.
Q Would you tell us about that, please?
A Trying to get somebody to stay with him. And I go over and the wife does his laundry, go over and do that. I tried to mow his yard a few times, rake the leaves, take him to the doctors. His garage was falling down, I rebuilt the garage, got it stabilized, put a new roof on it.
Q When did you do that?
A It would have been in '92, somewhere in there, before I was operated on.
Q You and your father, would you describe, how would you describe your relationship with your father?
A Close.
Q How about your brothers? Where are they at now, the four brothers?

A Gilbert, the oldest, is in SanDiego, California. My brother Bill is in Cuyahoga Falls. My brother Bruce, he's

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in Chicago. And my brother Gary lives in Bath.
Q Would you tell us the things that you and your wife like to do together?
A Well, I got her started on the fishing, she likes that. And we just like to be around each other.
Q The type, what types of things do you do together?
A Go out to eat, go on vacations, go shopping.
Q Dave, I'm going to hand you what has been marked as Tompkin 64, which is a listing of various bills.
Would you take a look at that, please?
And my question to you is, to the best of your understanding, does that contain reference to at least some of the bills that you have incurred as a result of your lung condition, lung cancer?
A I would say yes, because, it looks okay.
I'd say, yes.
Q One other question I want to go back to. I don't know this is on the record.
During the period before you smoked Chesterfield and Pall Malls, did you ever see any ads in magazines or elsewhere regarding those cigarettes? Putting aside what the ads may have said for the moment, just did you ever see ads regarding those cigarettes, to the best of your

recollection, before you began smoking them?
A I would say yes.
Q I would like to go to the year 1992. Now during that year, you've indicated you were diagnosed of suffering, that you were suffering from lung cancer on June 26th, 1992?
A That's correct.
Q Up until that point in time, had you been working full time, as best you recall?
A Yes, sir.
Q You had been seeing doctors to try to figure out what was wrong with you, is that true?
A Yes, sir.
Q Following your diagnosis -- or withdraw that.
The work you did on your dad's place, was that before or after June 26th, as best you recall?
A It would be after.
Q So you did that work for your dad after the diagnosis was made and told to you, as best you remember?
A Yes, as best I can recall.
Q What treatment did you receive following that diagnosis?
A Started with I had radiation and chemo.
Q And did either of those have an effect upon you, as far as the way you felt or?
A The radiation.

Q Or function?
A Beg your pardon.
Q No, excuse me, go ahead.
A The radiation I really didn't have too much after effects from that. Other than it started to close the throat area or something for swallowing, I would have problems swallowing.
But there was, I don't remember the sequence of events, but the radiation they stopped, I think it was because they remarked me on something, remarked positions and changed me to a different position because I had as

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many rads as they could give me in that one direction, so I think there was a pause in-between there, and it started to alleviate that problem. And then I didn't really get that much treatment afterwards from the radiation.

Chemo, it was, you can't describe it. It's nausea, disorientation, nervousness, cannot concentrate. I paced the house like a caged bear. I always remember the bear at as kid up at the Perkins Woods and watched him pace back and forth, and that's the best way I could describe my pacing back and forth in the house.

Food I couldn't eat. I stuck with basically peanut butter and jelly. Plastic, to this day I cannot stand the smell of it.

Q What is that?

A Plastic.
Q Plastic?
A The smell, curtain hanging. It brings back the memory of curtains in the hospital, the pan I used told hold in front of me.
Q Before you were told by Dr. Haas as to what you had, and have for that matter, did you have the symptoms prior to that time?

Were you hurting anywhere before Dr. Haas told you you had lung cancer?

A Yes, sir.
Q Tell us of the pain you were having?
A It was in the right rib cage.
Q Did you, can you tell us when you started losing weight?
A Yes, I did.
Q And when did you start losing weight?
A I really couldn't say for sure.
Q Are you still working full time?
A Yes, sir.
Q And can you tell us whether your condition is having an impact on your work?
A Yes, it is.
Q Tell us about it, please?
A Can't plan too far ahead. Cause I've been told the

cancer spread to the base of the neck on the right side and I'm going to have to have chemo treatments again, maybe in January. He's not sure. So, my partner wanted to bid the one project, it would have been a nice job, but just couldn't do it. So we have to stay with stuff that maybe takes a month, two, three months, that's as far as I can plan ahead.
Q How long would that job be that your partner wanted to do?
A Summer to fall.
Q On your day-to-day activities on your job, do you notice any problems with your chest or lungs or wind?
A Well, my breath, day before yesterday when I was working I had to stop and go over and lean against my truck and catch my breath, get my breath back. I can't lift the weight I used to.
Q How about mowing grass and things of that type?
A No.
Q Did that have any effect upon you?
A Yes, sir.

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Q What is that?
A Our front yard is about as big as this room, and as soon as I mow that I have to mow that and sit on the patio.
Q How big is the room, your ballpark best estimate?
A About 40 by.

Q How many?
A I mean 14 by 24, 25, 26.
Q Did you ever have blacking out spells or almost blacking out spells?
A Yes, sir.
Q Would you tell us about that?
A When I first went back to work, after the operation and came home, any time I bent over, I couldn't even hardly get on my knees, but when I did bend down there, I would have tendencies to black out, and I would have to sit down. And this took, ballpark figure, six months, seven months.
Q Dave, I think you told me there was one plus to what you are going through?
A Yes, sir.
Q What is that?
A I started to go back to church. And refocusing my life.
Q Let's talk about the future for a minute.
Have you been told whether or not you are going to have any further surgery, or they just talk about chemotherapy?
A Surgery is out.
Q Have you had surgery done in the past?
A Yes, sir.
Q And that would have been approximately when?

A In September of 1992.
Q And what was that?
A They removed a portion of my right lung. It was 40 percent. And they removed as much or the tumor, and I suppose they took the tumor or whatever else out.
Q Was that an uncomfortable experience?
A Yes, it was.
Q Want to tell us a little bit about it?
A I had tubes in my side, it was approximately 3/8 of an inch in diameter. Looked like it was a garden hose. It was probably 8 to 10 inches long. It was fastened to my side and was inside the rib cage. And there was a tube from there ran down to a box. And the nurse used to call it my suitcase. It would filter whatever it was draining out and go through that. And I had a pillow you put under your arm to keep this tube rigid, straight, so it doesn't move. If it moved it would rub against all the raw nerve endings and everything, and that was the most excruciating pain I ever felt in my life.
Q Dave, you are working. How do you feel when you get done working on a day?
A Tired.
Q Any different than you used to feel?
A Yes, sir.
Q And would you tell us, please?

A The majority of times I have to come home, lay down to lay down may be a half hour or so.

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Q Can you tell us whether you experience any difficulty in talking about your problem with other people?
A Yes, sir.
Q Tell us about that, please?
A If people ask me how I feel I used to tell them, like try to tell them the truth, and I would say what was the matter or something, they just kind of lower their eyes and kind of walk away from you. If I said that I had a year to live or they say, well, everybody doesn't know when they are going to die. It's most people are just uncomfortable about it.
Q How do you handle those things now when you are around people when the subject brought up?
A It doesn't bother me. I try, I've only got a couple people I can confide in.
Q You mentioned this year to live. Tell us about what are you talking about there.
A Dr. Haas diagnosed I had tumors mors back in the right lung in December 28th.
Q What year now are we talking about?
A That would have been last year.
Q '93?
A '93.

Q He means tumors had returned, he told you?
A Yes, there is a tumor in the right lung and tumor in the left lung.
Q What did he tell you the significance of that on your life?
A Well, he says that surgery is out, definitely. Radiation, because the right lung has a tumor in it and they can't give me any more radiation on that right side, so they can't take your right lung out because it's in the left. And so the only alternative I have left is chemotherapy.
Q Did he mention to you the one year figure that you just referred to a few minutes ago?
A He didn't want to talk about it either. I don't. So I, he started out the room and I says, Dr. Haas, I would like to have you come back in here. I says, because I would like to know. So he come back in the room and I says, how long have I got?
And he says, I can't say.
And I says, I understand that you can't say, nobody knows, I says, but from past experiences what would you say? And he said a year.
Q That was December of last year?
A Yes.
Q Dave, how do you view the future as you sit there with us today?

A Just there is none.
Q Does that bother you, sir?
A Yes, it bothers me.
MR. SMITH: That's all I have.
THE COURT: That completes the direct examination.
We will be in recess now until 9:00 o'clock tomorrow morning. Please do not discuss this case among yourself nor let anyone else discuss the case with you. You are excused. We'll see you at 9:00 o'clock tomorrow morning.

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Counsel, please remain.
(The jury withdrew from the courtroom and the following proceedings were conducted in open court, outside the presence of the jury.)
THE COURT: Do the defendant's want to run the cross the first thing tomorrow.
MR. COFER: Yes, your Honor. Unless it creates a scheduling problem for Mr. Smith. Do you have a problem?
THE COURT: That's what I wanted to discuss. Tomorrow is Friday. I don't know what you've got planned.
MR. SMITH: Sort of Dr. Day and two daughters. Your Honor, we are going to try to put on Dr. Haas,

Dr. Cross, Dr. Netzley, those two would be very short.
THE COURT: You don't have Sidransky coming tomorrow?
MR. SMITH: No, sir. I can't get him back home in time because of the airlines.
THE COURT: You talk it among yourself whether you wants to run the cross first thing in the morning or later?
MR. COFER: My view is we are happy to accommodate Mr. Smith. I understand the witness difficulties. You tell me what you want to do.
THE COURT: I don't need to know that tonight.
MR. COFER: That's right. I'll work that out with Russ.
MR. SMITH: Your Honor, there is one thing he might be thinking about. Dr. Feingold was in New York when the tower came down. In fact, he was across the street and he was helping somebody, and he was in the middle of it and he got out of it, but he's not very eager to get on an airplane; he hasn't been on one.
There is a case that is someplace else where they are taking him by live video. And I spoke to him last night and he wondered if, late last night -- I've done it in depos but.
THE CLERK: We are able to do that if you

wanted it. The only thing is it would have to take place either in the lunch room of the clerk's office or in Judge Polster's chambers and Judge Gwin's courtroom.
THE COURT: Well, you discuss it among yourselves and I'll try to accommodate you, and these are difficult days.
MR. SMITH: Yes, sir.
THE COURT: I've got to go, I've got to be in Canton by 4:00.
MR. McLAUGHLIN: Thank you, your Honor.
MR. COFER: Thank you.
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C E R T I F I C A T E

We, Susan Trischan and Richard G. DelMonico, Official Court Reporters, in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

_____
Susan Trischan
Official Court Reporter

_____
Richard G. DelMonico
Official Court Reporter

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